TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, [illegible]

No. [illegible]

UNITED STATES, PETITIONER,

vs.

VERMONT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER [illegible], [illegible]

CERTIORARI GRANTED DECEMBER [illegible], [illegible]

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 509

UNITED STATES, PETITIONER,

vs.

VERMONT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

Civil Action No. 3177

UNITED STATES OF AMERICA, Plaintiff,

v.

CUTTING & TRIMMING, INC., CHITTENDEN TRUST COMPANY OF BURLINGTON; RAINBOW CHILDREN'S DRESS CO. OF NEW YORK, AND THE STATE OF VERMONT.

DOCKET ENTRIES

Mar. 10, 1961	Filed Complaint.
Mar. 10, 1961	Issued Summons and delivered same to Marshal for service.
Mar. 17, 1961	Filed Summons returned served in part.
Mar. 18, 1961	Filed Notice of Appearance of George R. McKee, Esq., for defendant Chittenden Trust Company of Burlington.
Apr. 4, 1961	Filed Answer of Defendant State of Vermont, notice of appearance of Thomas M. Debevoise, Esq., Attorney General, and John D. Patterson, Esq., Deputy Attorney General, for the State of Vermont and certificate of service. Mailed copy to George R. McKee, Esq.

[fol. 2]

Apr. 5, 1961	Filed Answer of the Defendant, Chittenden Trust Company, Certificate of Service, and Notice of Appearance of George R. McKee, Esq. for Defendant, Chittenden Trust Company.
Apr. 25, 1961	Filed plaintiff's motion for Judgment on the Pleadings and certificate of service.
May 8, 1961	Filed Notice of Appearance of Lisman & Lisman, Esqs. for defendant Cutting & Trimming, Inc.

Docket Entries

May 8, 1961	Filed Answer of Defendant Cutting & Trimming, Inc.
June 16, 1961	Filed Motion for Judgment on the Pleadings and Certificate of Service.
June 16, 1961	Filed Motion for Order of Service Under 28 U.S.C. sec. 1655 and Certificate of Service.
June 28, 1961	Filed Consent of defendant Cutting & Trimming, Inc. to motion for Order of service as to Rainbow Children's Dress Company.
July 7, 1961	Hearing on motion for order of service under T28 U.S.C., Sec. 1655 as to Rainbow Children's Dress Company U. S. Atty. and Asst. U. S. Atty. for plaintiff.
July 7, 1961	Ordered: Motion granted.
July 14, 1961	Filed Affidavit in Support of motion for order for service by publication.
July 17, 1961	Filed Order re appearance on or before 9-5-61, as to Rainbow Children's Dress Co. Delivered copies to Marshal for service.
Sept. 7, 1961	Filed Proof of Publication.
Sept. 14, 1961	Filed Marshal's Return on Publication of Notice.
Nov. 8, 1961	Filed Stipulation for continuance to Feb. Term, 1962.
Nov. 9, 1961	Filed Order granting stipulation for con- [fol. 3] tinuance to Feb. 1962 Term. Mailed copies to Attys. of record.
Dec. 16, 1961	Filed plaintiff's Motion for Leave to Amend Complaint, and Certificate of Service.
Dec. 18, 1961	Filed Order granting leave to amend complaint. Mailed copy to Attys.
Mar. 3, 1962	Filed Notice of Appearance of Charles J. Adams, Esq., Attorney General, and Charles E. Gibson, Jr., Esq., Deputy Attorney General, for defendant State of Vermont.
Mar. 3, 1962	Filed Defendant State of Vermont's Motion for Leave to Amend Answer and Certificate of Service.

Docket Entries

Mar. 8, 1962	Filed State of Vermont's Motion for Leave to Amend Answer, and Certificate of Service.
Mar. 9, 1962	Hearing on motions to amend answer of defendant State of Vermont. John H. Carnahan, Esq., Asst. U. S. Atty., and John G. Penn, Esq., for Government, Louis Lisman, Esq. for defendant Cutting & Trimming, Inc., George R. McKee, Esq. for defendant Chittenden Trust Company, Charles E. Gibson, Esq., Deputy Atty. Gen., for defendant State of Vermont.
Mar. 9, 1962	Ordered: Both motions to amend answer of defendant State of Vermont granted.
Mar. 9, 1962	Hearing on motions for Judgment on the pleadings against defendants Cutting & Trimming, Inc. and State of Vermont.
Mar. 9, 1962	Mr. Penn for Government; Mr. Gibson for defendant State of Vermont; Mr. Lisman for defendant Cutting & Trimming, Inc.; and Mr. McKee for defendant Chittenden Trust Company, argue to the Court.

[fol. 4]

Mar. 9, 1962	Taken under advisement. State of Vermont has until the first of next week to furnish the Court a memo.
Apr. 5, 1962	Filed Plaintiff's Interrogatories to defendant, Cutting & Trimming, Inc. and Certificate of Service.
June 6, 1962	Filed Judgment order as to Disposition of sum of $1,878.82 held by Chittenden Trust Company of Burlington.—to State of Vt. $1,628.15, secondly, as far as possible, to State of Vt. for interest on $1,628.15 from 10-21-58 to date; thirdly, as far as possible payment of any balance to United States. Copy mailed to attorneys.

DOCKET ENTRIES

June 15, 1962	Filed Final judgment pursuant to rule 54 (b) of the Federal rules of Civil procedure, as to Defendants State of Vermont and Chittenden Trust Company of Burlington. Mailed copy to attorneys.
June 16, 1962	Filed Notice of Appeal. Mailed copy to U. S. Atty., John G. Penn, George R. McKee, Lisman & Lisman, Halperin, Morris, Granett & Cowan, Charles J. Adams and Charles E. Gibson, Jr.
June 16, 1962	Filed Motion to stay execution pending appeal. Certificate of Service.
June 18, 1962	Filed Order to stay execution pending appeal.
July 19, 1962	Filed Motion to extend time for filing record and docketing appeal and Order thereon. Mailed copy to attys.
July 23, 1962	Filed Motion to extend time for filing record and docketing appeal, and order extending time to 9-14-62. Mailed copy to Attys.

[fol. 5]

Sept. 7, 1962	Mailed record on Appeal to Clerk, U. S. Court of Appeals, N. Y., N. Y.
Sept. 18, 1962	Filed Answer to plaintiff's interrogatories.
Sept. 18, 1962	Mailed Supplemental Record on Appeal to Clerk, U. S. Court of Appeals for the Second Circuit.

In United States District Court

Complaint—Filed March 10, 1961

The United States of America, by its attorney, Louis G. Whitcomb, United States Attorney for the District of Vermont, for its complaint herein respectfully alleges and shows:

I

This action has been requested by the Commissioner of Internal Revenue who is a delegate of the Secretary of the Treasury of the United States and is brought under direction of the Attorney General of the United States.

II

Jurisdiction of this action is conferred upon this Court by Sections 7401, 7402(a), and 7403 of Title 26, United States Code and Sections 1340 and 1345 of Title 28, United States Code.

III

This is a civil action arising under the Internal Revenue Code of the United States where the United States seeks to foreclose tax liens.

IV

The United States of America is now and was at all times herein mentioned a corporation sovereign and body politic.

V

Defendant Cutting & Trimming, Inc., is a duly organized and licensed corporation doing business within the jurisdiction of this Court.

VI

[fol. 6] Defendant Chittenden Trust Company of Burlington maintains an office and is authorized to do and is doing business within the jurisdiction of this Court.

VII

On information and belief, defendant Rainbow Children's Dress Co., is a corporation licensed to do business in New York.

VIII

Defendant State of Vermont is a corporation sovereign and body politic within the jurisdiction of this Court.

IX

On information and belief, on each of some twenty days during the calendar year 1958, each of said days having been in a different calendar week, the total number of persons employed by said Cutting & Trimming, Inc., for some portion of the day was four or more and to each of whom wages were paid by said corporation. By reason of such employment and payment of wages, on February 6, 1959, an assessment of $5,360.71 was made on behalf of the plaintiff (otherwise known as taxes under the Federal Unemployment Tax Act). Interest in the amount of $5.25 was included in said assessment, making a total assessment of $5,365.96. On or about February 10, 1959, notice of said assessment was given to and demand was made upon said Cutting & Trimming, Inc., for payment of the amount thereof. $54.31 of said assessment has been paid and there remains due and owing $5,311.65.

X

On information and belief, on each of twenty days during the calendar year 1959, each of said days having been in a different calendar week, the total number of persons employed by said Cutting & Trimming, Inc., for some portion of the day was four or more and to each of whom wages were paid by said corporation. By reason of such employment and payment of wages, on June 9, 1959, a jeopardy assessment of $381.13 was made on behalf of [fol. 7] the plaintiff (otherwise known as taxes under the Federal Unemployment Tax Act). On or about June 9, 1959, notice of said jeopardy assessment was given to and demand made upon said Cutting & Trimming, Inc., for payment of the amount thereof. No part of said assessment has been paid.

XI

During all times from and including April 1, 1959, to and including May 30, 1959, Cutting & Trimming, Inc.,

employed diverse persons to each of whom wages were paid by them on account of such employment; and because of said employment and payment of wages, the District Director of Internal Revenue at Burlington, Vermont, made a jeopardy assessment of the amounts of the percentage of the wages to have been deducted and withheld by said Cutting & Trimming, Inc., from such wages as taxes upon the income of such employees (otherwise known as withholding taxes). Notice of said assessment was given on behalf of the plaintiff to and demand for payment of the amount thereof was made upon said Cutting & Trimming, Inc. The amount of taxes, the date thereof, the date of said notice and demand, any payment made on said assessment and the date thereof, any abatement made on said assessment and the date thereof, and the balance due of said assessment are set out opposite the taxable period for which made, as follows:

Taxable Period	Tax	Jeopardy Assessment Date	Date of Notice & Demand	Payments		Abatement		Balance Due
April 1, 1959 through May 30, 1959	$10,971.70	6/9/59	6/9/59	$4,289.08	6/9/59	$27.85	10/15/59	$6,527.96
				$ 126.81	7/16/59			

XII

On information and belief, the defendant Chittenden Trust Company of Burlington has personal property in its possession belonging to defendant, Cutting & Trimming, Inc., namely, the sum of $1,878.82.

XIII

[fol. 8] It is alleged on information and belief that defendants, Chittenden Trust Company of Burlington, Rainbow Children's Dress Co. of New York, and the State of Vermont claim some right, title, or interest to the personal property described in paragraph XII herein.

Wherefore, the United States of America prays:

1. That each of the defendants be summoned and required to answer this complaint and set forth specifically such right, title, or interest each may have in the personal property described in paragraph 12 herein.

2. That it be adjudged and decreed that the defendant Cutting & Trimming, Inc., is indebted to the United States

of America in the sum of $12,220.74 plus interest as provided by law.

3. That the Court find and decree that the United States of America has a valid and subsisting lien on all property of Cutting & Trimming, Inc., in the possession of Chittenden Trust Company for the amount of the tax liability and that said liens is prior and paramount to the claims of any and all parties to this proceeding.

4. That the Court issue an order directing the Chittenden Trust Company to surrender to the plaintiff, United States of America, as much of Cutting & Trimming, Inc.'s property in Chittenden Trust Company's possession as is necessary to satisfy plaintiff's lien.

5. That if upon final determination of this cause there remains unsatisfied any part of the amount of said tax liability, that the plaintiff have and recover judgment against the defendant Cutting & Trimming, Inc., for the amount thereof.

6. That the Court grants such other, further and different relief as the Court deems just and proper.

s/Louis G. Whitcomb, United States Attorney.

[fol. 9] In United States District Court

Answer of the Defendant, State of Vermont—Filed April 4, 1961

Now comes the State of Vermont by Thomas M. Debevoise, its Attorney General and makes answer to the plaintiff's Complaint as follows:

I

The defendant, State of Vermont, has no knowledge with respect to the allegation in Paragraph One of the Plaintiff's Complaint and leaves the plaintiff to its proof.

II

The defendant, State of Vermont, admits the jurisdiction of the Court.

III

The defendant, State of Vermont, admits the nature of the action except that it does not admit that the United States has an enforceable tax lien as against it, the State of Vermont.

IV

The defendant, State of Vermont, admits the allegations of Paragraph Four.

V

The defendant, State of Vermont, admits the allegation in Paragraph Five.

VI

The defendant, State of Vermont, admits the allegations in Paragraph Six.

VII

The defendant, State of Vermont, has no information with respect to the allegations in Paragraph Seven and leaves the plaintiff to its proof.

VIII

[fol. 10] The defendant, State of Vermont, admits the allegations in Paragraph Eight.

IX

The defendant, State of Vermont, has no information with respect to the allegations in Paragraph Nine of the plaintiff's Complaint and leaves the plaintiff to its proof thereof, except that it denies that the assessment therein alleged, if such there was, is effective as against the State of Vermont with respect to the sum of money held by the defendant, Chittenden Trust Company, mentioned in Paragraph Twelve of the plaintiff's Complaint.

X

The defendant, State of Vermont, has no information with respect to the matters alleged in Paragraph Ten of the plaintiff's Complaint and leaves the plaintiff to its proof thereon, except that it denies that the assessment

therein alleged was effective in any way against the defendant, State of Vermont, with respect to the sum of money held by the defendant, Chittenden Trust Company, as specified in Paragraph Twelve of the plaintiff's Complaint.

XI.

The defendant, State of Vermont, has no knowledge with respect to the allegations made in Paragraph Eleven of the Plaintiff's Complaint and leaves the plaintiff to its proof thereof, except that it denies that the assessments therein mentioned are in any way effective as against the State of Vermont with respect to the sum of money held by the Chittenden Trust Company as said sum is mentioned in Paragraph Twelve of the plaintiff's Complaint.

XII

The defendant, State of Vermont, admits that the defendant, Chittenden Trust Company of Burlington, Vermont, has personal property in its possession in the amount of One Thousand Two Hundred Seventy-eight Dollars and Eighty-two Cents ($1,278.82), but denies that the said sum [fol. 11] belongs to the defendant, Cutting & Trimming, Inc., but to the contrary, is now the property of the State of Vermont.

XIII

The defendant, State of Vermont, is without information with respect to the claims of the defendants, Chittenden Trust Company of Burlington and Rainbow Children's Dress Co. of New York, and leaves the plaintiff to its proof with respect to same and admits that the State of Vermont does claim right, title and interest in and to the personal property described in Paragraph Twelve of the plaintiff's Complaint. The defendant, State of Vermont, alleges that under date of May 21, 1959, it commenced suit against the said defendant, Cutting & Trimming, Inc. in the Chittenden County Court, a court of general jurisdiction in the County of Chittenden and State of Vermont, and that the Chittenden Trust Company, a Vermont banking corporation was joined in said suit as trustee of said Cutting & Trimming, Inc.; that said defendants, Cutting & Trimming, Inc. and Chittenden

Trust Company were duly served and proper return made in said suit to the Chittenden County Court; that the Chittenden Trust Company entered its appearance in said action and disclosure was made, by which it showed that it held the sum of One Thousand Two Hundred Seventy-eight Dollars and Eighty-two Cents ($1,278.82) as trustee of said Cutting & Trimming, Inc. and therein agreed to answer to the said Chittenden County Court with respect to said sum of money as the Court Order directed; that on October 23, 1959, Judgment was entered by said Chittenden County Court in behalf of the plaintiff, State of Vermont, against the said defendant, Cutting & Trimming, Inc., in the amount of Four Thousand and Forty-nine Dollars and Twenty-two Cents ($4,049.22) and against the said defendant, Chittenden Trust Company, in the amount of One Thousand Two Hundred Seventy-eight Dollars and Eighty-two Cents ($1,278.82) and that a Judgment Order was duly issued on said entry; that the Chittenden Trust Company held said sum of One Thousand Two Hundred Seventy-eight Dollars and Eighty-two cents ($1,278.82) [fol. 12] since the service of the said writ of the State of Vermont upon it and still holds said sum of money against the right of the State of Vermont; that said Judgment Order remains in full, unsatisfied.

Wherefore, the Defendant, State of Vermont, Prays:

1. That the Complaint of the Plaintiff, United States of America, be dismissed as to it, the said State of Vermont.

2. That it be adjudged and decreed that the sum of One Thousand Two Hundred Seventy-eight Dollars and Eighty-two Cents ($1,278.82) held by the defendant, Chittenden Trust Company, of right belongs to the said State of Vermont as against the claim of all other parties to this suit.

3. That the Court issue an Order directing the Chittenden Trust Company to surrender and pay over to the State of Vermont, in satisfaction of the Judgment Order herein before set forth, the said sum of One Thousand Two Hundred Seventy-eight Dollars and Eighty-two Cents ($1,278.82).

4. That the Court grant such other and further relief

to the defendant, State of Vermont, as the Court deems just and proper.

Dated at Montpelier in the County of Washington and State of Vermont, this 31st day of March, A. D. 1961.

s/Thomas M. Debevoise, Attorney General for the State of Vermont.

[fol. 13] Certificate of Service (omitted in printing)

NOTICE OF APPEARANCE

To the Clerk of the above named Court:

We hereby enter our appearance for the State of Vermont in the above-entitled action.

s/Thomas M. Debevoise, Attorney General, Montpelier, Vermont. s/John D. Paterson, Deputy Attorney General, Montpelier, Vermont.

IN UNITED STATES DISTRICT COURT

ANSWER OF THE DEFENDANT, CHITTENDEN TRUST COMPANY—
Filed April 5, 1961

Now comes the Chittenden Trust Company, defendant in the above entitled cause, by George R. McKee, Esquire, of Burlington, Vermont, its attorney, and makes answer to the Complaint filed in said cause as follows:

1. The defendant, Chittenden Trust Company, for answer [fol. 14] alleges it has insufficient knowledge or information respecting allegations set forth in Paragraphs I, III, V, VII, IX, X, XI, of said Complaint and therefore leaves the plaintiff to its proof.

2. The defendant for answer to allegations II, IV, VI, VIII admits the same.

3. The defendant for answer to allegation XII in said Complaint admits it has in its possession the sum of $1,878.82 which personal property it has at all times been ready and willing to pay to the party legally entitled to the same and has held it in its possession for the reason that the money had been attached by three claimants, to wit: Rainbow Children's Dresses, the State of Vermont and the United States Government, arising from the following processes:

(a) Rainbow Children's Dress Company vs. Cutting & Trimming, Inc. and Chittenden Trust Company, trustee, served on said Bank Feb. 20, 1959, as a result of which said Trustee disclosed on Feb. 24, 1959 it had in its hands $600.00 belonging to said Cutting & Trimming, Inc.

(b) Writ served on said Trustee on May 25, 1959 by the State of Vermont, as a result of which disclosure was made to Chittenden County Court on May 27, 1959 that said bank had in its hands money due defendant in the amount of $1,278.82.

(c) On June 2, 1959, a Federal Tax Lien and Levy was served on said Trustee against Cutting & Trimming, Inc., as a result of which said bank disclosed it had in its hands the sum of $1,278.82 and recited the disclosure of said amount having been made to the Court in State of Vermont vs. Cutting & Trimming, Inc. and said bank by attachment heretofore.

The total amount of said money in its possession is as aforesaid, $1,878.82.

4. The defendant, Chittenden Trust Company for answer [fol. 15] to allegation XII of said Complaint says that it holds in its possession the sum of $1,878.82 and has been at all times and is ready and willing to make payment to one of the three aforesaid parties hereinafter set forth as claimants, to wit: Rainbow Children's Dress Company, the State of Vermont, and the United States of America and said bank disclaims any title in said funds other than as Trustee of same and shall make payment to whichever party the said Court in this cause shall determine is entitled to receive the same.

5. The defendant, Chittenden Trust Company, for answer further says that upon determination by the Court of the issues claimed in said Complaint, it shall abide by such order as may issue from the Court in its determination to whom the said funds belong and upon payment of the same as directed by the Court shall be relieved and held harmless from any liability in the payment of same.

6. That the Court grant such other further relief as the Court deems just and proper.

Dated at Burlington, Vermont, this 31st day of March A.D. 1961.

Chittenden Trust Company, by Geo. R. McKee, Its Attorney.

Certificate of Service (Omitted in printing)

[fol. 16] NOTICE OF APPEARANCE

To the Clerk of the above named Court:

I hereby enter my appearance for the Chittenden Trust Company in the above-entitled action.

s/Geo. R. McKee, Esquire, 138 Church Street, Burlington, Vermont.

IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT ON THE PLEADINGS—Filed April 25, 1961

Comes now the United States of America, plaintiff in the above-entitled cause, by its attorney, Louis G. Whitcomb, United States Attorney for the District of Vermont, and respectfully moves the Court to enter judgment on the pleadings in favor of the plaintiff herein as prayed for in the complaint against the defendant, State of Vermont, on

the ground that plaintiff is entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings.

s/Louis G. Whitcomb, United States Attorney.

[fol. 17] IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANT, CUTTING & TRIMMING, INC.—Filed May 8, 1961

1. The said defendant admits the allegations of Paragraphs I, II, III, IV, V, VI, VII, and VIII of the Plaintiff's Complaint.

2. The said defendant denies the allegations of Paragraphs IX, X, and XI of the Complaint, except the allegation of the making of an assessment against said defendant. Further answering, said defendant admits that it is obligated to the plaintiff but denies the amount of the obligation to be as stated in the said assessment or in the said Complaint. Said defendant also admits that the plaintiff is entitled to the fund in the Chittenden Trust Company.

3. The said defendant admits the allegations of Paragraphs XII and XIII of said Complaint.

By: s/Louis Lisman.

Attorneys for Defendant Cutting & Trimming, Inc.: Lisman & Lisman, 191 College Street, Burlington, Vermont. Halperin, Morris, Grannett & Cowan, 1740 Broadway, New York 19, New York.

[fol. 18] IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT ON THE PLEADINGS—Filed June 16, 1961

Now comes the United States of America, plaintiff in this civil action, by its attorney, Joseph F. Radigan, United States Attorney for the District of Vermont, and respectfully moves the Court to enter judgment on the

pleadings in favor of the plaintiff as prayed for in the complaint against defendant Cutting and Trimming, Inc., on the ground that the plaintiff is entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings.

Joseph F. Radigan, United States Attorney. By: s/Joseph E. Frank, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

MOTION FOR LEAVE TO AMEND COMPLAINT—Filed Dec. 16, 1961

Comes now the United States of America, plaintiff in the above-entitled cause, by its attorney, Joseph F. Radigan, United States Attorney for the District of Vermont, and respectfully moves for leave of the Court to amend its complaint by adding at the end of paragraph IX of the complaint, the following sentence:

> "Notice of Lien was filed on or about June 2, 1959 with the City Clerk, Burlington, Vermont, as provided by law."

The grounds for this motion is that the additional sen- [fol. 19] tence was omitted in the complaint and is relevant, material and essential in order for there to be a fair adjudication of this case.

s/Joseph F. Radigan, United States Attorney.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO AMEND—Filed Dec. 18, 1961

Now, on this 18 day of Dec., 1961, plaintiff, United States of America, appearing by its attorney, Joseph F. Radigan, and plaintiff asks leave to amend its complaint by adding to paragraph IX of the complaint the sentence, "Notice of Lien was filed on or about June 2, 1961 with

the City Clerk, Burlington, Vermont, as provided by law," and the Court being fully advised in the premises, grants leave to plaintiff to amend its complaint as prayed.

s/Ernest W. Gibson, United States District Judge.

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT, STATE OF VERMONT, FOR LEAVE TO AMEND ANSWER—Filed Mar. 3, 1962

Now comes the State of Vermont, a defendant in the above-entitled cause, by its Deputy Attorney General Charles E. Gibson, Jr., and respectfully moves for leave of the Court to amend its Answer by adding at the end of paragraph 13 of the Answer the following language: [fol. 20] "That the aforesaid suit was brought after certain assessments and demands were made upon the defendant in said suit and after certain liens were filed, all as set forth hereafter.

On October 21, 1958, assessment and demand was made on the defendant, Cutting & Trimming, Inc., for withholding taxes for the third quarter, 1958, in the amount of $1,628.15, and on October 30, 1958, a notice of lien for said taxes was filed in the City Clerk's Office, Burlington, Vermont, as provided by law and recorded in Volume 13, Page 306.

On February 7, 1959, assessment and demand was made against the defendant, Cutting & Trimming, Inc., for withholding taxes for the fourth quarter, 1958, taxes due being in the amount of $964.08, with penalty, interest and costs as provided by law coming to $1,023.40, and a notice of lien was filed in the latter amount for said taxes in the City Clerk's Office, Burlington, Vermont, on February 13, 1959, and recorded in Book 13, Page 336.

The grounds for this motion is that the additional sentence was omitted in the Answer and is relevant, material and essential in order for there to be a fair adjudication of this case.

Sate of Vermont By s/Charles E. Gibson, Jr., Deputy Attorney General.

March 2, 1962.

[fol. 21] IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT, STATE OF VERMONT FOR LEAVE TO AMEND ANSWER—Filed March 8, 1962

Now comes the State of Vermont, a defendant in the above-entitled cause, by its Deputy Attorney General Charles E. Gibson, Jr., and respectfully moves for leave of the Court to amend the Answer by adding at the end of paragraph 13 the following language:

"That the aforesaid assessments were made on the basis of a quarterly withholding tax return filed on October 21, 1958, by the defendant, Cutting and Trimming, Inc., with the Vermont Tax Department, said return reporting that the amount of $1,628.15 was withheld by Cutting and Trimming, Inc., from the wages of its employees for the third quarter 1958 and a withholding tax return filed on February 7, 1959, by the defendant, Cutting and Trimming, Inc., had withheld from the wages of its employees for the fourth quarter 1958 the amount of $964.08. The defendant, Cutting and Trimming, Inc., failed to pay the amounts for which it was liable to the State of Vermont as set forth in its withholding returns aforesaid, assessments and demands were made as indicated heretofore and suit was brought on the State of Vermont to enforce its tax liens."

The grounds for this motion is that the additional language was omitted in the Answer and is relevant, material and essential in order for there to be a fair adjudication of this case.

State of Vermont, By Charles E. Gibson, Jr., Deputy Attorney General.

March 7, 1962.

[fol. 22] IN UNITED STATES DISTRICT COURT

JUDGMENT ORDER AS TO DISPOSITION OF SUM OF $1,878.82 HELD BY CHITTENDEN TRUST COMPANY OF BURLINGTON—Filed June 6, 1962

The United States, seeking to foreclose its tax liens, filed this action against the taxpayer, Cutting & Trimming, Inc. It named as party defendants, Chittenden Trust Company, Rainbow Children's Dress Co., and the State of Vermont. Defendant Rainbow Children's Dress Co. went out of business sometime in 1961, and has entered no appearance in this action. The background facts essential to this particular problem may be simply stated. Defendant, Chittenden Trust Company, has possession of the sum of $1,878.82, which was deposited with it by the defendant, Cutting & Trimming. To enforce its liens on this sum of money, the plaintiff has moved for judgment on the pleadings. That the plaintiff is entitled to the bank deposit is admitted by all of the defendants except the State of Vermont. The State of Vermont has opposed the motion insofar as it claims a prior right to a portion of the money held on deposit by the Trust Company, and in its answer to the complaint, the State has set up a prayer for a decree stating its prior right.

There is no dispute about the remaining facts. On October 21, 1958, the State of Vermont made an assessment and demand on defendant Cutting & Trimming for $1,628.15 for state withholding taxes it then claimed due for the third quarter of 1958. The State filed notice of lien on October 30, 1958, pursuant to 32 V.S.A. Sec. 5765. The federal Commissioner of Internal Revenue made an assessment on the taxpayer, Cutting & Trimming, amounting to $5,365.96 on February 9, 1959. This assessment was for taxes arising in the year 1958 under the Federal Un-[fol. 23] employment Tax Act. Notice of lien was filed by the Commissioner on June 2, 1959, pursuant to 26 U.S.C.A. Sec. 6323. There were other assessments and notices of lien by both the State and the United States, but it is not necessary to consider them here. It is necessary to note only that the first lien of the State of Vermont was filed in October of 1958, and the first lien of the federal government was filed in June of 1959. The priority of right to the

money held by the Trust Company must be determined according to the relative priority of these liens.

Before examining the liens in question here, it should be noted that the State instituted a suit against Cutting & Trimming in a Vermont state court on May 21, 1959, joining the Chittenden Trust Company as trustee. Judgment for the State for the taxes owing by Cutting & Trimming was rendered on October 23, 1959. Realizing that it can claim no priority as a judgment creditor over the earlier lien of the United States the State now relies entirely on its status as a holder of lien for taxes.

The record discloses no insolvency on the part of the taxpayer, Cutting & Trimming. The Federal Priority Statute, R.S. Sec. 3466, 31 U.S.C.A. Sec. 191, therefore is not applicable here. The United States relies upon its position as holder of a lien created by Sec. 6321 of Title 26, U.S.C.A. This statute does not confer priority upon the federal liens so created. Sec. 6322 of the same title states when the lien shall arise, and how long it shall last. Sec. 6323 of the same title sets out the validity of the lien as it relates to certain classes of persons (none of which is applicable in this case), and the filing and notice requirements. The United States then has two methods of enforcing the tax lien. Section 6331-6344 of Title 26, U.S.C.A. provide for the seizure of property for collection of taxes. Section 6331 in particular refers to levy and distraint upon all property of the defaulting taxpayer on which, in one instance, there is a lien for the payment of taxes. The second enforcement method is found in Section 7403 of Title 26, U.S.C.A., which provides for enforcement of the lien by civil action. That provision is the basis for the action now before this Court.

[fol. 24] The State of Vermont in turn relies upon its position as holder of a lien created by Section 5765 of Title 32, V.S.A. This statute is applicable only in cases of employers, and in connection with nonpayment of withholding taxes. Otherwise, it is an identical state counterpart of the federal lien provisions in 26 U.S.C.A. Section 6321, 6322 and 6323.[1] The state enforcement provision

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[1] 32 V.S.A. Section 5765. Amount of withheld taxes as lien against employer.

If any employer required to deduct and withhold a tax

is also similar to that in the federal statutes. By reference to the Vermont chattel mortgage statute,[2] the tax lien foreclosure provision incorporates the remedy of either public sale by a public officer, or foreclosure by a bill in equity. [fol. 25] The determination of priority of the competing liens in this case is governed by federal law. *United States* v. *Brosnan*, 363 U.S. 237, 80 S. Ct. 1108, 4 L.Ed. 2d 1192 (1960); *Aquilino* v. *United States*, 363 U.S. 509, 80 S.Ct. 1277, 1285, 4 L.Ed. 2d 1365, 1371 (1960). Further, the determination of this Court is to be guided by the principles outlined by the Supreme Court in *United States* v. *City of New Britain*, 347 U.S. 81, 74 S.Ct. 367, 98 L.Ed. 520 (1954). Indeed,

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under section 5761 of this title neglects or refuses to pay the same after demand, the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such employer. Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable. Such lien shall be valid as against any subsequent mortgagee, pledgee, purchaser or judgment creditor when notice of such lien and the sum due ~~has~~ been filed by the commissioner of taxes with the clerk of the town or city in which the property subject to the lien is situated, or, in the case of an unorganized town, gore, or grant, in the office of the clerk of the county wherein such property is situated. In the case of any prior mortgage on real or personal property so written as to secure a present debt and also future advances by the mortgagee to the mortgagor, the lien herein provided, when notice thereof has been filed in the proper clerk's office, shall be subject to such prior mortgage unless the commissioner of taxes also notifies the mortgagee of the recording of such lien in writing, in which case any indebtedness thereafter created from mortgagor to mortgagee shall be junior to the lien herein provided for.

[2] V.S.A. Section 5767, the foreclosure provision, refers to Sections 1791-1797 of Title 9, V.S.A.

both the State and the United States rely entirely on the *New Britain* case. Thus it is important to examine that case carefully in connection with the matter at hand. An enlightening study of *New Britain* is found in an article by Professor Frank Kennedy[3] in which he examines the development of federal tax lien priority from *Spokane County* v. *United States*, 279 U.S. 80, 49 S. Ct. 321, 73 L.Ed. 621 (1929) to *United States* v. *City of New Britain, supra.* However, since that article was written, the Supreme Court has found the federal tax lien to be superior to competing liens in several cases.[4] This might well alter some conclusions gained from the article. No case has dealt with a tax lien as here asserted by the State of Vermont. These more recent cases, therefore do not alter this Court's conclusions about *New Britain,* as it particularly relates to the present action.

Statutory liens must be unquestionably complete to overcome the federal tax lien priority. This is most obvious in [fol. 26] the cases just cited. The test established by the *New Britain* case, at page 84, is that the "priority of each statutory lien contested here must depend on the time it attached to the property in question and became choate." Choate, as defined in Webster's New International Dictionary, 2nd Ed., 1952, means complete. It comes from the word inchoate, derivative of the Latin, *incohare,* which means to begin or to initiate. As used in connection with liens, as indicated by the rulings of the Supreme Court,

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[3] Frank P. Kennedy: *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien.* 63 Yale L.J. 905 (1954).

[4] *United States* v. *Acri,* 348 U.S. 211, 75 S.Ct. 239, 99 L.Ed. 264 (1955); *United States* v. *Liverpool & London & Globe Ins. Co.,* 348 U.S. 215, 75 S.Ct. 247, 99 L.Ed. 268 (1955); *United States* v. *Scovil,* 348 U.S. 218, 75 S.Ct 244, 99 L.Ed. 271 (1955); *United States* v. *Colotta,* 350 U.S. 808, 76 S.Ct. 82, 100 L.Ed. 725 (1955); *United States* v. *White Bear Brewing Co.,* 350 U.S. 1010, 76 S.Ct. 646, 100 L.Ed. 871 (1956); *United States* v. *R. F. Ball Construction Co.,* 355 U.S. 587, 78 S.Ct. 442, 2 L.Ed. 2d 510 (1958).

it means that not only must a lien be more than initiated, it means that all steps must be taken that will insure that the lien will not be lost. In some cases, it has meant that the lienor must bring suit and obtain judgment. See particularly in this respect the dissent by Mr. Justice Douglas in *United States* v. *White Bear Brewing Co.,* 350 U.S. 1010, 76 S.Ct. 646, 100 L.Ed. 871 (1956). Another word is used in the *New Britain* case in connection with the requirements of a successfully competing lien, i.e. "perfected." Perfection in the sense used means that "there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *United States* v. *City of New Britain, supra,* at page 84.

Here is the nub of the whole matter in this case. Of the federal tax lien created by Section 6321, the Supreme Court said in the *New Britain* case, again at 84, "The federal tax liens are general and, in the sense above indicated, perfected." The Court referred to the use of the word perfected as set out above. There is no question that the federal tax lien is considered a choate and perfected lien upon all of the property of the taxpayer when properly filed according to Section 6323. And there is no question that the lien of the United States attached to the property of Cuttings & Trimming, including the money deposited in the Chittenden Trust Company, at the time the assessment was made. The same must be true of the tax lien of the State of Vermont, as created and given force by identical statutory language. Compare *Ersa, Inc.* v. *Dudley,* 234 F2d 178 (CCA 3rd Cir., 1956) where a Pennsylvania state tax lien was characterized by the Pennsylvania courts [fol. 27] as not attaching to personal property until a writ of *fieri facias* was issued on a judgment entered on the lien. In that case, the federal tax lien prevailed where it was filed after the state tax lien was filed, but before the writ of *fieri facias* had been issued.

I cannot agree with the contention of the United States that the *New Britain* case establishes a requirement of specificity that defeats the State's lien in this case. While the terms "general" and "specific," and in particular the combination of "general and inchoate lien," are used by

the courts in discussing competing liens,[5] this factor is not a controlling one here.[6]

Indeed the federal tax lien is a general lien, and this fact does not deprive it of validity or effectiveness. *United States* v. *City of New Britain, supra; United States* v. *City of Greenville,* 118 F2d 963, 965 (CCA 4th Cir. 1941). Moreover, the factors that are significant to the tax liens in this case are stated by the Supreme Court in *New Britain,* and as set out above, are the factors of perfection and choateness, or completeness. These are the factors that are also discussed in the cases both before and after *New Britain.* In *United States* v. *Security Trust & Savings Bank,* 340 U.S. 47, 71 S.Ct. 111, 95 L.Ed. 53 (1950), Mr. Justice Minton's opinion applies its attention to the contingencies involved with the competing attachment lien, and the fact that it was not perfected or complete. Essentially the same concern is revealed in the *Acri, Scovil,* and *Liverpool & London* cases, all of which relied upon the *Security Trust* case. See footnote 4, *supra.*

To proceed then, the amount of the State's lien is established; the State is identified as the lienor; and [fol. 28] the property subject to the lien, even though it is personal property rather than realty, is identified. Further, nothing remains to be done except to enforce the lien. It is in no way contingent, nor a "caveat of a more perfect lien to come."[7] In many instances, the State has only to have a public sale of the property covered by its tax lien. If judicial assistance is sought, as by a bill in equity, there is no uncertainty as to the outcome of this method of enforcement which would raise any question of complete-

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[5] Mr. Justice Douglas uses this phrase in his dissent in *White Bear Brewing Co.* case, cited in note 4, supra.

[6] That a lien is general rather than specific is particularly significant when it must compete with the tax lien in a situation where the insolvency priority statute is applicable. *United States* v. *Gilbert Associates,* 345 U.S. 361, 366, 73 S.Ct. 701, 97 L.Ed. 1071 (1953); cf. Mr. Justice Whittaker's discussion in note 4 at page 252 in *James* v. *United States,* 366 U.S. 213, 81 S.Ct. 1052, 6 L.Ed.2d 246 (1961).

[7] *United States* v. *Scovil, supra,* at 220.

ness.[8] In other words, we are not dealing here with a private creditor who holds a garnishment, attachment or similar statutory lien, and who may or may not be successful in necessary future litigation against his debtor. We are dealing with the competing tax liens of two sovereigns. The State of Vermont must secure adequate public revenue to sustain its public burdens, as must the United States. In order to secure public revenue, tax lien legislation has become necessary. The State is in no way prohibited from making use in its State statute of federal statutory language that has proved effective. The tax lien of the State, then, as created by this statutory language, is fully choate and perfected, as is the tax lien of the United States. Cf. *Gower* v. *State Tax Commissioner*, 207 Or. 288, 295 P2d 162 (1956). To find otherwise would be giving the respective statutory provisions nothing less than a spurious construction and would create an unjustifiable double standard.

The whole concept of the Vermont Graduated Income Tax Law was that such law should be based entirely on the Federal Internal Revenue Code. This was the recommendation that the Governor of Vermont made in his inaugural address in January, 1947. See Vermont Senate Journal Biennial Session 1947, p. 709, 725. The bill that was passed by the Vermont Legislature and approved April 26, 1947 followed that basic concept completely. See No. 15 Public Acts 1947. Section 17 of that Act declared its purpose to be, in addition to that of raising revenue, to have the [fol. 29] Vermont Graduated Income Tax Law conform as closely as may be with the Internal Revenue Code et al. Indeed, Chapter 151 of Title 32, V.S.A. entitled Income and Franchise Taxes, starts out with this same statement of purpose—that which was originally adopted in 1947.

The 1947 legislature did not see fit to follow the Governor's recommendation to institute a complete system of employers withholding of State Income taxes but this was adopted by the 1949 legislature. See Act No. 26, Public Acts of 1949, approved May 13, 1949. Thus, complete em-

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[8] *United States* v. *Acri, supra; United States* v. *Liverpool & London & Globe Ins. Co., supra.*

ployers withholding has been part of the Vermont Income Tax law ever since. Then, in 1953, the Legislature of Vermont took another logical step. By Act No. 265 of Public Acts of 1953, approved June 4, 1953, it adopted the lien imposing provisions used by the State in its levy of October 21, 1958.

In passing this Act, as in all its other existing income tax laws, the legislature conformed as closely as may be with the Internal Revenue Code by using the exact language found in Sections 6321-23 of the Internal Revenue Code— the sections that were used by the United States in imposing its lien of February 9, 1959.

To hold that the State cannot do what the United States can do under statutes using identical language simply doesn't make sense.

While the Supreme Court has been persistent in maintaining the protection and superiority of the tax liens of the federal government, its ruling in the *New Britain* case, in this Court's view, does not direct the result contended for here by the United States. The priority of these statutory liens is, then, "determined by another principle of law, namely, 'the first in time is the first in right'." *United States* v. *City of New Britain, supra,* at 85; cf. *Commercial Credit Corporation* v. *Schwartz,* 130 F. Supp 524 (D.C.Ark., 1955), and *United States* v. *Williams,* 139 F. Supp 94 (D.C. N.Car., 1956). The lien of the State of Vermont was the first in time, it is therefore the first in right.

[fol. 30] This lien is for taxes, as stated at the outset, in the amount of $1,628.15. The State, therefore, has a right to receive that amount, plus interest from the date of assessment and demand, from the Chittenden Trust Company, to the extent of the funds held on deposit for Cutting & Trimming.

It is hereby Ordered that the Chittenden Trust Company disburse the money held by it on deposit for Cutting & Trimming, Inc. in the following manner:

1) Payment first shall be made to the State of Vermont in the amount of $1,628.15.
2) Secondly, as far as possible, payment shall be made to the State of Vermont for interest on $1,628.15, computed from October 21, 1958 to date.

3) Thirdly, as far as possible, payment of any balance shall be made to the United States of America.

It is further Ordered that upon such payment the Chittenden Trust Company shall then be released from all liability in this matter and is discharged as a defendant in this case.

Ernest W. Gibson, United States District Judge.

Done at Brattleboro, District of Vermont, this 6 day of June, 1962.

Endorsed: Filed June 6, 1962.

Arnold A. Murray, Clerk.

[fol. 31] IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT PURSUANT TO RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE, AS TO DEFENDANTS STATE OF VERMONT AND CHITTENDEN TRUST COMPANY OF BURLINGTON—Filed, June 15, 1962

Whereas, upon consideration of plaintiff's motion for judgment on the pleadings against State of Vermont and Chittenden Trust Company of Burlington, an opinion and judgment order was rendered by this Court on June 6, 1962; and

Whereas, all claims of the plaintiff arising in this particular action against the State of Vermont and the Chittenden Trust Company were determined by that order; and

Whereas, there is no just reason for delay in directing a final judgment as to the State of Vermont and the Chittenden Trust Company in this matter, while rights and liabilities of the United States and the defendant Cutting & Trimming, Inc. remain for adjudication;

It is therefore ordered pursuant to Rule 54(b) F.R.C.P. that the judgment order of this Court dated June 6, 1962,

is a final judgment in this action as to the Chittenden Trust Company of Burlington and the State of Vermont.

Ernest W. Gibson, United States District Judge.

Done at Brattleboro, in the District of Vermont, this 15th day of June, 1962.

Endorsed: Filed June 15, 1962.

Arnold A. Murray, Clerk.

[fol. 32] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed, June 16, 1952

Notice is hereby given that the United States of America, plaintiff, hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment Order as to Disposition of Sum of $1,878.82 held by Chittenden Trust Company of Burlington, entered June 6, 1962, and made final under Rule 54(b) by order entered June 15, 1962.

Joseph F. Radigan, United States Attorney. By: John H. Carnahan, John H. Carnahan, Assistant United States Attorney.

Address: Federal Building, Rutland, Vermont.

Endorsed: Filed June 16, 1962.

Arnold A. Murray, Clerk.

IN UNITED STATES DISTRICT COURT

ORDER TO STAY EXECUTION PENDING APPEAL—Filed, June 18, 1962

On motion of the United States Attorney, counsel for the Plaintiff herein;

It is ordered that execution of the Judgment Order as to Disposition of Sum of $1,878.82 Held by Chittenden Trust

[fol. 33] Company of Burlington, entered herein on June 6, 1962, and made final under Rule 54(b) as to defendants State of Vermont and Chittenden Trust Company by order dated June 15, 1962, be and it is suspended pending appeal.

Dated at Brattleboro, in the District of Vermont, this 18 day of June, 1962.

Ernest W. Gibson, United States District Judge.

Filed June 18, 1962.

[fol. 34] In the United States Court of Appeals for the Second Circuit

No. 272—October Term, 1962

Argued April 11, 1963

Docket No. 27779

United States of America, Appellant,

v.

The State of Vermont; Cutting & Trimming, Inc.; Chittenden Trust Company of Burlington; Rainbow Children's Dress Company of New York, Appellees.

Opinion—May 9, 1963

Before: Moore, Friendly and Hays, Circuit Judges.

Appeal by the United States from a judgment of the District Court for Vermont, Ernest W. Gibson, Judge, 206 F. Supp. 951, upholding the priority of a lien of the State of Vermont for state withholding taxes over a subsequent lien of the United States for taxes under the Federal Unemployment Tax Act. Affirmed.

Joseph Kovner (Louis F. Oberdorfer, Assistant Attorney General, Lee A. Jackson, Fred E. Youngman, Attorneys) (Joseph F. Radigan, United

States Attorney, John H. Carnahan, Assistant United States Attorney, on brief), for United States of America.

[fol. 35] Charles E. Gibson, Jr., Attorney General, Montpelier, Vermont, for the State of Vermont.

FRIENDLY, *Circuit Judge:*

This case raises a question in the vexed field of federal tax lien priority not squarely ruled by any of the numerous decisions of the Supreme Court. It involves a conflict between a state tax assessment, definite in amount, which became a lien on all of a taxpayer's property but did not relate to specific assets, and a later federal tax assessment with precisely the same attributes, in a situation to which the federal priority-in-insolvency statute, R. S. § 3466, now codified in 31 U. S. C. § 191, is not in terms applicable. The District Court for Vermont upheld the priority of the state tax lien, 206 F. Supp. 951. We agree.

The circumstances giving rise to the controversy are these:

The Vermont statutes provide, 32 V. S. A. § 5765, that if an employer who is required to deduct and withhold a tax from an employee's wages fails to pay the same after demand, "the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such employer," and further that "Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable." The lien becomes valid "as against any subsequent mortgagee, pledgee, purchaser or judgment creditor" once notice is filed with the clerk of the town, city or, in some instances, county where the property is situated. On October 21, 1958, [fol. 36] Vermont made an assessment and demand on Cutting & Trimming, Inc. for $1,628.15 for withholding taxes due for the third quarter of 1958; it filed notice of lien on October 30 with the city clerk of Burlington. On May 21,

1959, it instituted suit in a state court against Cutting & Trimming, Inc., and joined Chittenden Trust Co., a Burlington bank, as a defendant. In consequence of a writ served on May 25, Chittenden Trust Co. disclosed that it had in hand $1,278.82 owing to Cutting & Trimming plus another $600 previously attached by Rainbow Children's Dress Company. On October 23, 1959, judgment was entered for Vermont against Cutting & Trimming for $4,049.22—this including other assessments not here relevant—and against Chittenden Trust Co. for $1,278.82.

Meanwhile, on February 9, 1959, the Commissioner of Internal Revenue made an assessment of $5,365.96 against Cutting & Trimming for 1958 taxes under the Federal Unemployment Tax Act. Under §§ 6321 and 6322 of the Internal Revenue Code of 1954, this amount thereupon became "a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." On June 2, 1959, notice of lien was filed pursuant to § 6323 of the Code.

Later, in 1961, the United States brought this action against Cutting & Trimming, Chittenden Trust Co., the State of Vermont, and Rainbow Children's Dress Company, to establish the indebtedness of Cutting & Trimming for taxes in a larger amount than the February 9, 1959, assessment, and to foreclose its lien against the property of Cutting & Trimming held by the trust company ahead of Vermont's lien. Vermont's answer alleged that its lien had priority as a result of the October 21, 1958, assessment.[1] [fol. 37] On cross-motions for judgment on the pleadings, the District Court decreed that Chittenden Trust Co. apply the $1,878.52 held by it first to the principal and then to the interest of Vermont's lien, with any balance payable to the United States, and directed, under F. R. Civ. Proc. 54(b), that this be a final judgment as to the trust company and the state.

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[1] Vermont does not, and could not, rely on its status as a judgment creditor under the October 23, 1959, judgment in the state court, since notice of the federal lien had been filed prior to that time. See 26 U. S. C. § 6323 (§ 3672 of Internal Revenue Code of 1939).

In defending against the appeal of the United States from this judgment, Vermont relies on the principle that, at least as between liens of the same sort, the first in time is the first in right. It emphasizes that its lien, which predated the federal lien, was in every other material respect identical to it. The state lien, like the federal, attaches to "all property and rights to property, whether real or personal, belonging to" the taxpayer, arises "at the time the assessment * * * is made," and is valid once notice has been filed as against any subsequent "mortgagee, pledgee, purchaser, or judgment creditor." 32 V. S. A. § 5765; 26 U. S. C. §§ 6321-6323. The *verbatim* similarity is not a coincidence; as Judge Gibson pointed out, 206 F. Supp. at 956, the Vermont legislation was avowedly modeled on the Internal Revenue Code. Enforcement also is similar; Vermont, like the federal government, could have enforced its lien on the fund here at issue either by a civil action in the courts or by direct seizure and public sale.[2]

[2] Section 7403 of the Internal Revenue Code provides for enforcement of a federal tax lien by civil action; §§ 6331-6344 provide for seizure and sale. Although Judge Gibson did not fully develop the statutory basis for his statement that public sale as well as civil action would be an available means of enforcing Vermont's lien, 206 F. Supp. at 953, see also 955, the proposition seems entirely sound. In 1958, when this case arose, the controlling provision was 32 V. S. A. § 5767, which states that "The lien provided for by section 5765 of this title may be foreclosed in the case of real estate agreeably with the provisions of law relating to foreclosure of mortgages on real estate, and in the case of personal property, agreeably with the provisions of law relating to the foreclosure of chattel mortgages." While the provisions relating to foreclosure of mortgages on real estate apparently allow this to be done only by bill or petition in equity, see 12 V. S. A. §§ 4521 *et seq.*, chattel mortgages can be foreclosed as well by direct public sale, 9 V. S. A. §§ 1793-1797; hence that remedy would have been available here as to the money held by the bank.

In 1959 Vermont strengthened these provisions by en-

[fol. 38] Against this the United States argues that the first in time principle is inapplicable because (1) decisions of the Supreme Court have established that the federal lien would prime Vermont's if Cutting & Trimming had been insolvent so that the federal priority-in-insolvency statute, 31 U. S. C. § 191 (former R. S. § 3466), would have come into play, and (2) the same principle should be—or at any rate has been—applied when the Government relies only on the tax lien statutes, §§ 6321-23 of the Internal Revenue Code.

The Government's first proposition is beyond successful challenge. In cases governed by R. S. § 3466, the Supreme Court has upheld the priority of United States tax claims against an Illinois tax lien, arising prior to Government's, which we find indistinguishable from Vermont's here, *Illinois* v. *Campbell*, 329 U. S. 362, 370-76 (1946), and even against an antecedent lien for state property taxes assessed upon certain machinery owned by the taxpayer, *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361 (1953). It is the Government's second proposition that is debatable.

Considering the two statutes solely on the basis of their language and purpose, we find nothing that calls for identical results and much that leads to different ones. R. S. [fol. 39] § 3466, which goes back to 1796, 1 Stat. 515, says, in the strongest possible terms, that "Whenever any person indebted to the United States is insolvent * * * the debts due to the United States shall be first satisfied." In cases to which it applies, it gives this prime position to all "debts due to the United States," whether liens or not; the only issue in such cases is how far the words of the statute should be restricted by withdrawing from their sweep property of the insolvent upon which a rival claimant has

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acting 32 V. S. A. § 5763, which makes applicable to the employers' withholding tax here involved "the provisions * * * of chapter 155 of this title." Those provisions include 32 V. S. A. § 6067, which provides that "When a tax * * * is not paid within sixty days after the same becomes due, the commissioner shall issue a warrant * * * to the sheriff * * * commanding him to levy upon and sell the real and personal property of the taxpayer * * *."

secured a "lien".[a] It is in this connection that the Supreme Court has developed the rule that a lien contesting against the priority of the United States cannot escape the literal impact of R. S. § 3466 unless at "the crucial time" it was "definite, and not merely ascertainable in the future by taking further steps," as to the identity of the lienor, the amount of the lien, and the property to which it attaches, *Illinois* v. *Campbell, supra,* 329 U. S. at 375; whether a lien passing even this severe test will in fact escape the breadth of R. S. § 3466, the Court has not decided. *Spokane County* v. *United States,* 279 U. S. 80 (1929); *New York* v. *Maclay,* 288 U. S. 290 (1933); *United States* v. *Texas,* 314 U. S. 480 (1941); *United States* v. *Waddill, Holland & Flinn, Inc.,* 323 U. S. 353 (1945); *Illinois* v. *Campbell, supra; United States* v. *Gilbert Associates, Inc., supra;* see Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien,* 63 Yale L. J., 905, 911-19 (1954). In contrast, the federal tax lien statutes, which trace their ancestry to 1865, 13 Stat. 470-71, and were re-enacted for the first time in 1866, 14 Stat. 107, have remained silent for nearly a century on the very issue as to which R. S. § 3466 has spoken so clearly since the earliest [fol. 40] days; they say nothing to create a priority for tax liens of the United States over similar but earlier tax liens of the states or municipalities. This silence of the lawmakers of 1865-66 becomes more eloquent when the language of the tax lien statutes is contrasted with the Bankruptcy Act of 1867, 14 Stat. 517, 531, passed by the same Congress that had re-enacted the former legislation and by many of the same Congressmen who had passed it originally. Section 28 of the Bankruptcy Act gave priority, immediately after administration expenses, to "All debts due to the United States, and all taxes and assessments under the laws thereof", these being ranked ahead of "All debts due to the State in which the proceedings in bankruptcy

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[a] If the rival claimant has attained the status of "mortgagee, pledgee, purchaser, or judgment creditor," he then prevails, under 26 U. S. C. § 6323 (formerly § 3672 of the 1939 Code), against even an antecedent federal tax lien, if notice thereof has not been previously filed.

are pending, and all taxes and assessments made under the laws of such State." Thus, when the Congress of those days wished to prefer the federal government, it knew how to say so.[4] Furthermore, it was not until *United States* v. *Security Trust & Savs. Bank, infra,* decided in 1950, that Congress could have had any reason to suppose that what it had failed to say with respect to priority in the tax lien legislation of the 1860's would be supplied for it by judicial construction.

With this background, one would think it fairly plain that when a tax lien of the United States encounters a state tax lien of precisely the same nature, the case would be governed by the "cardinal rule" laid down by Chief Justice Marshall in *Rankin & Schotzell* v. *Scott,* 12 Wheat. (25 U. S.) 177, 179 (1827):

> [fol. 41] "The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant."

Arguing against this, the Government tells us that "In the collection of its revenue the Federal Government must necessarily have supremacy over the states (and the numerous local tax authorities deriving their power from those states)," since "the Federal Government is not in a position * * * to match the timing of the innumerable state and local tax liabilities." Whatever force such an argu-

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[4] See also § 5004(a)(1) of the Internal Revenue Code of 1954. This statute, which provides explicitly that the federal lien for taxes on distilled spirits shall be a "first lien" on the property to which it attaches, was first enacted in 1868, 15 Stat. 125. The enactment afforded protection to prior lienors whose liens would thereby be outranked by requiring that waivers of their priority be obtained before a distiller could obtain the performance bond necessary for legal entry into the distilling business. 15 Stat. 128, § 5177 (b)(2) of the Internal Revenue Code of 1954.

ment might or might not have with Congressmen, who after all are not without some local allegiances, the Government points to nothing in the language or history of the tax lien statutes to show that Congress entertained the purpose thus attributed to it. Moreover, the change in the priority provisions of the Bankruptcy Act made in 1898, 30 Stat. 563, and continued to this day, § 64, 11 U. S. C. § 104, whereby claims of states and their subdivisions, even when they have not become liens at the critical date, were elevated to the same rank as similar tax claims of the United States, casts doubt on the existence of the policy here claimed.

The Government quite rightly reminds us that, however all this may be, we are not reading from a clean slate but from one that bears copious writing by the Supreme Court. This begins, for present purposes, with *United States* v. *Security Trust & Savs. Bank,* 340 U. S. 47 (1950)—a case in which, as has been pointed out, the Court was "without [fol. 42] benefit of a brief for the respondent."[5] The decision, which established priority of the federal tax lien over that arising from an attachment under a California statute permitting a plaintiff to attach the property of a defendant at any time "as security for the satisfaction of any judgment that may be recovered", is plainly distinguishable from the instant case. Although the attachment had preceded the date of the federal lien, judgment had not, and the Supreme Court of California itself had said that "The attaching creditor obtains only a potential right or a contingent lien * * * ", which, depending on the eventualities of his lawsuit, might never come into effect; the rule of "first in time, first in right" surely need not be read so broadly as to permit a state to place someone in the "first" position by resort to the fictional doctrine of "relation back." But Mr. Justice Minton went on to say:

> "In cases involving a kindred matter, i.e., the federal priority under Rev. Stat. § 3466, it has never been held sufficient to defeat the federal priority

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[5] Brown, The Supreme Court 1957 Term—Foreword: Process of Law, 72 Harv. L. Rev. 77, 84 n. 37 (1958).

> merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it. [Citing Illinois v. Campbell, *supra.*] If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here."

To us this falls considerably short of saying, as the Government asserts, that the entire body of law holding that certain liens had not reached the level required to raise the [fol. 43] question whether they might overcome the priority expressly accorded the United States by R. S. § 3466, was transplanted to the federal tax lien statutes which by their terms accorded none. We read it as saying only that, just as the § 3466 priority could not be overcome by a state's baptizing as a lien something which in fact was "merely a lis pendens notice that a right to perfect a lien exists", 340 U. S. at 50, the rights of the federal government under the tax lien statutes likewise could not be.

That Mr. Justice Minton did not mean to say in *Security Trust* what the Government says he did, was made quite clear four years later in *United States* v. *New Britain,* 347 U. S. 81 (1954). There, in upholding the liens of city real estate taxes and water rents insofar as these had attached before the federal tax assessments, he sharply distinguished the situation where "the debtor is insolvent" and hence "all the property of the debtor is involved," in which case "Congress has expressly given priority to the payment of indebtedness owing the United States * * * by § 3466 of the Revised Statutes" from the situation "where the debtor is not insolvent", in which case "Congress has failed to expressly provide for federal priority, * * * although the United States is free to pursue the whole of the debtor's property wherever situated." *Id.* at 85.[6] In the latter

[6] The Court's next sentence, "The State, having a lien only upon property within its boundaries, may not reach beyond the state line to fasten its lien upon other prop-

situation, the Court held, "priority of these statutory liens [fol. 44] is determined by another principle of law, namely, 'the first in time is the first in right'." *Ibid.*[7]

Indeed, *New Britain* would unquestionably decide this case in favor of Vermont but for one circumstance, the crucial character of which the Government contends to have

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erty," may be thought to run exactly counter to the Government's contention, noted above, that the tax collection problems of the United States require a reading of the tax lien statutes that would prefer its liens to similar but earlier state or local tax liens.

[7] The *New Britain* decision would seem to have definitively rejected one argument, not advanced in this Court, that would sustain the Government's position here. This is the view, taken by Mr. Justice Jackson's concurring opinion in *Security Trust*, 340 U. S. at 51, that the statute which is now § 6323 of the Internal Revenue Code of 1954 and was formerly § 3672 of the 1939 Code, see note 3 *supra*, by protecting the rights of mortgagees, pledgees, purchasers, and judgment creditors whose interests arise even after the federal tax lien where the latter has not been recorded, has the effect of subordinating all lienors who cannot bring themselves within one of those four categories even though their liens arise prior to the federal tax lien. The legislative history and purpose of the statute make the argument quit untenable, as is pointed out by Professor Brown in the comment cited in note 5 *supra*, 72 Harv. L. Rev. at 84-85 & n. 39, and as Mr. Justice Jackson himself, by concurring in the Court's opinion in *New Britain*, apparently later recognized. The argument was heavily pressed upon the Court by the Government in *New Britain*, see its Brief at 6-7, 13, 22-24, and its Reply Brief at 7, but was demolished by Professor Kennedy as counsel for New Britain. See Supplemental Brief for Respondent at 10 n. 16, 11-12, 13-14. The Court's decision in favor of the city's prior liens must be taken to have rejected it, since Mr. Justice Minton's opinion for the Court in *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361 (1953), makes clear that *New Britain* could not have been considered a "judgment creditor" within the terms of former § 3672, and there was no other way in which the city could bring itself within that section.

been recognized in *New Britain* itself. This is that the city liens for taxes and water rents that were there preferred over the federal tax liens "attached to specific pieces of real property." 347 U. S. at 84. We thus are confronted with the not uncommon question whether, when the Supreme Court has mentioned a factor as one of several leading to a decision, this is to be regarded as critical. Cf. *Larios* v. *Victory Carriers, Inc.*, — F.2d —, — (2 Cir. 1963). Illumination on that issue here is shed by another portion of the *New Britain* opinion dealing with the city's contention that [fol. 45] the specific nature of its liens, as against the general nature of the Government's, gave it priority even for liens attaching *after* the federal tax assessments. The Court rejected this claim on the basis that "the priority of each statutory lien contested here must depend on the time it attached to the property in question and become choate," 347 U. S. at 86, and that the prior federal tax liens, although general, were "choate" as soon as they attached. It would seem that if the general federal tax lien under §§ 6321 and 6322 is thus sufficiently "choate" to prevail over a later specific local tax lien, a general state tax lien under an almost identically worded statute must also be "choate" enough to prime a later and equally general federal tax lien under Chief Justice Marshall's "cardinal rule" of "first in time, first in right", in the absence of contrary direction by Congress. So Judge Parker said in dictum in *United States* v. *Greenville*, 118 F. 2d 963, 966 (4 Cir. 1941), a case cited with apparent approval in *New Britain*, 347 U. S. at 84.

The Government also presses upon us post-*New Britain* decisions of the Supreme Court under the tax lien statutes. Of these, only *United States* v. *Buffalo Savings Bank*, 371 U. S. 228 (1963), concerns rival liens arising from tax assessments of a state or municipality, and it adds nothing relevant to the instant case, since the local liens there, like the city liens held junior in *New Britain*, attached subsequent to the assessment of the federal taxes. *United States* v. *Acri*, 348 U. S. 211 (1955) (attachment lien prior to judgment), and *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215 (1955) (garnishment lien prior to judgment), were similar to *Security Trust* and are distinguishable from the instant case on the same basis that it is.

In *United States* v. *Scovil*, 348 U. S. 218 (1955), the federal taxes were assessed and had become liens before the land-[fol. 46] lord's distress warrant issued; only the notice of the federal liens postdated the warrant, and the Court held that the lien created by such a warrant was not a mortgage, pledge, judgment or purchase under § 3672 of the 1939 Code, corresponding to § 6323 of the 1954 Code. See notes 3 and 7, *supra.* In *United States* v. *R. F. Ball Construction Co.*, 355 U. S. 587 (1958), decided *per curiam* by a 5-4 vote, the subcontractor's surety whose claim to priority was denied had rested its case on its alleged status as a mortgagee under § 3672 of the 1939 Code. This was also the claim espoused by the four dissenting Justices, who referred to § 3672 as "the statute here conceded by the parties to be controlling." 355 U. S. at 589-90. We see no reason to suppose that the case stands for anything more than a denial of this claim. But if it were to be read as having also decided that, apart from § 3672, the surety enjoyed no priority on the basis of "first in time, first in right" because its lien was not "choate," or if such a view is thought to have been a factor in the Court's decision that the surety's interest did not come within § 3672, the case can be distinguished here. For such a decision may well have turned on the fact that, as appears from the opinion of the District Court, 140 F. Supp. 60 (W. D. Texas), aff'd 239 F. 2d 384 (5 Cir. 1956), and the record, the surety's claim, based on an assignment made by the subcontractor in consideration for a performance bond covering a construction job in Texas, was for liabilities incurred on the subcontractor's behalf in connection with a completely different job in Louisville, Kentucky; the bond for this other job was not executed until nearly nine months after the assignment of funds to become due to the subcontractor on the Texas job, and the liabilities for which the surety was seeking to recover out of these funds had not yet arisen at the time the federal tax liens arose. See 4 Corbin, Contracts (1962 pocket part), at 147, n. 72; *United States* v. [fol. 47] *L. R. Foy Construction Co.*, 300 F. 2d 207 (10 Cir. 1962). The distinction would, indeed, be more satisfying if the federal tax assessment had preceded the making of the Louisville contract and not merely the accrual of losses

thereunder, but there is nothing to indicate that the Court focused on this point.

There remain[8] a series of mechanics' lien cases, all upholding priority of the federal tax lien and all decided by *per curiam* reversal on petition for certiorari: *United States* v. *Colotta,* 350 U. S. 808 (1955); *United States* v. *White Bear Brewing Co.,* 350 U. S. 1010 (1956); *United States* v. *Vorreiter,* 355 U. S. 15 (1957); and *United States* v. *Hulley,* 358 U. S. 66 (1958). See also *United States* v. *Kings County Iron Works, Inc.,* 224 F. 2d 232 (2 Cir. 1955). The *Vorreiter* case occasions no difficulty since, as appears from the report in 134 Col. 543, 307 P. 2d 475, 476 (1957), the federal tax lien arose, though it was not yet recorded, before the contracts giving rise to the mechanics' liens were made. Neither does the *Hulley* case since, as appears from the Government's petition for certiorari (in which is printed the unreported opinion of the Florida Circuit Court for Pinellas County), the United States tax assessment lists had been received by the District Director, and the federal tax liens had thus attached, on December 2, 1952 and January 7, 1954, long before the beginning of the construction work on March 11, 1955. In *Colotta,* the work had been completed before the federal assessment, 224 Miss. 33, 79 So. 2d 474, 475 (1955), but the decision, made on the Government's unopposed petition for certiorari over the dissent of Mr. Justice Douglas, may have turned on the fact that the holders of the me- [fol. 48] chanics' liens had neither recorded their contracts under § 359 nor filed the *lis pendens* notice provided for by § 380 of the Mississippi Code before the federal lien arose, nor had they taken any steps to enforce their liens by bringing suit and obtaining judgment. In *White Bear,* which drew a dissenting opinion from Mr. Justice Douglas joined by Mr. Justice Harlan, the mechanics' lien, although recorded, likewise had not been reduced to judgment when the federal taxes were assessed. See 227 F. 2d at 361.

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[8] We are aware also of *Aquilino* v. *United States,* 363 U. S. 509 (1960); *United States* v. *Durham Lumber Co.,* 363 U. S. 522 (1960); and *Crest Finance Co.* v. *United States,* 368 U. S. 347 (1961), but do not consider them relevant here.

Apparently, as suggested by Judge Haynsworth, dissenting in *United States* v. *Bond*, 279 F. 2d 837, 849 (4 Cir.), cert. denied, 364 U. S. 895 (1950),[9] the Supreme Court views a mechanic's lien, even if "duly filed and recorded and presently in the process of being foreclosed," as simply "an interim step in the lienor's progress toward the status of a judgment creditor and the foreclosure of all possible defenses to his claim," and thus as analogous to "the lien product of provisional remedies," such as those in *Security Trust, Acri, and Liverpool & London*. See Mr. Justice Douglas' dissent in *White Bear*, 350 U. S. at 1011. Whether or not this is the right explanation of *Colotta* and *White Bear*, and whether or not we might agree with Judge Haynsworth as to the equity of the doctrine in cases where the federal tax assessment, or even the notice thereof, postdates the construction work, see 279 F. 2d at 849 n. 8, we do not regard those decisions as controlling the case of a lien arising from a state or local tax assessment. Although such an assessment does not make the taxing body a "judgment creditor" within § 6323 of the Code, *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361 [fol. 49] (1953), see note 7 *supra*, it goes considerably further along that road than a mechanics' lien, which arises out of a private contractual arrangement and to which the taxpayer may have all sorts of defenses. At least this is true where, as here, the state or local government is no more required than is the United States to resort to the courts to enforce its due. See note 2 *supra*. As the Supreme Court said in *Bull* v. *United States*, 295 U. S. 247, 260 (1935), "The assessment is given the force of a judgment, and if the amount assessed is not paid when due,

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[9] The actual decision in that case is not relevant to our problem: it held that the portion of *New Britain* upholding the priority of federal tax assessments over subsequently accruing local tax liens was not rendered inapplicable because the taxes were paid by a mortgagee whose mortgage, having priority over the federal taxes by virtue of § 6323 of the Internal Revenue Code (former § 3672), covered such taxes. *Accord, United States* v. *Buffalo Savings Bank, supra*, 371 U. S. 228.

administrative officials may seize the debtor's property to satisfy the debt." This distinction seems to us the only way to reconcile the *Colotta* and particularly the *White Bear per curiams,* subordinating a mechanc's lien, earlier and on specific property, to the lien of a federal tax assessment, later and general, with the *New Britain* opinion which prefers a local tax lien on specific property to a later general federal tax lien but prefers the latter to a subsequent specific local tax lien.[10] Doubtless we shall soon be instructed if we are wrong.[11]

Affirmed.

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[10] A possible argument against reconciliation on this basis is that although New Britain's lien for real estate taxes could be enforced by levy and sale, 1949 Conn. Gen. Stats. § 1853 (1960 C. G. S. § 12-172), its lien for water rents could be enforced only by judicial foreclosure. 1949 Conn. Gen. Stats. §§ 758, 1863 (1960 C. G. S. §§ 7-239, 12-181). But the Government's Brief before the Supreme Court took no note of this distinction and, on the contrary, stated that both types of liens could be enforced summarily. P. 9 n. 2, p. 27 n. 13. Although a reference in the Reply Brief indicates that the Government may have become aware of the distinction, p. 5 n. 2, this hardly sufficed to disabuse the Court of the earlier concession (Brief, p. 27 n. 13) that both liens "may be enforced by levy and sale." See also Reply Brief, pp. 12-13.

[11] We recognize that in certain of the post-*New Britain* decisions under the tax lien statutes the Supreme Court has, for one purpose or another, cited cases under R. S. § 3466. See *United States* v. *Acri*, 348 U. S. at 213; *United States* v. *Scovil*, 348 U. S. at 220. But we would think it wrong to take such citations as overcoming the considered statement in *New Britain* as to the distinction between the two statutes.

[fols. 50-51] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

CUTTING & TRIMMING, INC., CHITTENDEN TRUST COMPANY OF BURLINGTON, ET AL., Defendants-Appellees.

JUDGMENT—May 9, 1963

Appeal from the United States District Court for the District of Vermont

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fols. 52-54] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title Omitted]

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME—July 1, 1963

Now comes the United States, by its attorneys, and respectively moves for leave to file a petition for rehearing out of time on the ground that this Court should reconsider its decision issued on May 9, 1963, in light of the decision of the United States Supreme Court in *United States* v. *Pioneer American Insurance Co.*, issued June 10, 1963, or 17 days after expiration of the time for filing a petition for rehearing, pursuant to Rule 25 of this Court. A copy of the petition for rehearing and of the

opinion in *United States* v. *Pioneer American Insurance Co.* is attached hereto.

Dated: July 1, 1963.

Louis F. Oberdorfer, W.R. Assistant Attorney General, Counsel for the Appellant.

Joseph F. Radigan, United States Attorney. John H. Carnahan, Assistant United States Attorney.

[fols. 55-59] IN THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER GRANTING MOTION TO FILE PETITION FOR REHEARING OUT OF TIME—July 3, 1963

A motion having been made herein by counsel for the appellant for leave to file the petition for rehearing out of time.

Upon consideration thereof, it is

Ordered that the said motion be and it hereby is granted.

A. Daniel Fusaro, Clerk. by Vincent A. Carlin, Chief Deputy Clerk.

[fol. 60] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 27779

UNITED STATES OF AMERICA, Appellant,

v.

CUTTING & TRIMMING, INC.; CHITTENDEN TRUST COMPANY OF BURLINGTON; RAINBOW CHILDREN'S DRESS COMPANY OF NEW YORK; THE STATE OF VERMONT, Appellees

On Appeal from the Judgment of the United States District Court for the District of Vermont

APPELLANT'S PETITION FOR REHEARING—Filed July 3, 1963

[fol. 61] *To the Honorable United States Court of Appeals for the Second Circuit and the Honorable Leonard P. Moore, Henry J. Friendly and Paul R. Hays, Circuit Judges thereof*:

Now comes the United States, by its attorneys, and respectfully petitions for a rehearing in this matter on the ground that the decision in this Court herein is inconsistent with the decision of the United States Supreme Court in *United States* v. *Pioneer American Insurance Co.*, decided June 10, 1963, which is reprinted in the Appendix hereto.

We think this Court's decision herein rests upon its holding that "the entire body of law holding that certain liens had not reached the level required to raise the question whether they might overcome the priority expressly accorded the United States by R. S. Sec. 3466"—or the full choate lien doctrine—was not transplanted to the federal tax lien statutes. Moreover, this Court rejected the Government's argument that in *United States* v. *New Britain*, 347 U. S. 81, the United States Supreme Court applied the test of a choate lien laid down in the Section 3466, Revised Statutes, cases, *i.e.*, that the lien must be definite, and not merely ascertainable in the future by taking further steps, as to the identity

of the lienor, the amount of the lien, and the property to which it attaches, to determine the priority of a state tax lien competing with the federal tax lien, absent insolvency. ***Pioneer American*** is, of course, distinguishable on its facts since it did not involve a state tax lien, but rather, the foreclosure fee of attorneys for a prior mortgagee, which, though provided for in the note and mortgage, was not fixed in amount until after recordation of the federal tax lien. Nevertheless, the ***Pioneer American*** opinion seems to us to resolve the basic premise upon which this Court has decided the instant case. In our reading, the ***Pioneer American*** opinion seems clearly to hold that the "entire body" of choate lien law developed in connection with Section 3466, Revised Statutes, was transplanted to the federal tax lien statutes and that, absent insolvency, a federal tax lien cannot be defeated except by a prior choate lien, *i.e.*, a lien, definite as to the identity of the lienor, the amount of the lien, and the property to which it attaches. It further seems to us expressly to say that the choate lien test was applied in *New Britain*. Thus, ***Pioneer American*** states:

> As for a lien created by state law, its priority depends " on the time it attaches to the property and [fol. 62] becomes choate." *United States* v. *New Britain, supra*, at 86; *United States* v. *Security Tr. & Sav. Bank*, 340 U. S. 47. Choate state-created liens take priority over later federal tax liens, *United States* v. *New Britain, supra; Crest Finance Co.* v. *United States*, 368 U. S. 347, while inchoate liens do not. See *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215; *United States* v. *Scovill*, 348 U. S. 218; *United States* v. *Colotta*, 350 U. S. 808. And it is a matter of federal law when such a lien has acquired sufficient substance and has become so perfected as to defeat a later-arising of later-filed federal tax lien. "Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined." *United States* v. *New Britain, supra*, at 86. The federal rule is that liens are perfected in the sense that there is nothing more to be done

to have a choate lien . . . . when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *Id.*, at 84.

We submit that the state tax lien in question here was not perfected when the federal lien arose, because though first assessed, no action had been taken by the State to attach its general lien to the specific property of the taxpayer, a bank account, claimed by the federal tax lien. The State's tax was not a choate lien within the test laid down by *Illinois* v. *Campbell*, 329 U. S. 362; *Spokane County* v. *United States*, 279 U. S. 80; *New York* v. *Maclay*, 288 U. S. 290; and *United States* v. *Texas*, 314 U. S. 480. Viewed in the light of *Pioneer American*, the critical factor in *New Britain* would seem to be that the local real estate tax liens there involved "attached to specific pieces of real property." (347 U. S., p. 84.) In the same light, *United States* v. *City of Greenville*, 118 F. 2d 963 (C. A. 4th), does not equate a general state tax lien with the federal tax lien, but rather holds that the general federal tax lien is as specific as the lien for local real estate taxes and improvement assessments on specific pieces of real property. As the opinion points out (p. 966), it was not necessary for the tax lien statute to provide, as does Section 3466, that the federal tax be first paid. It was enough that the federal tax lien is specific and perfected in fact and law. The choate lien [fol. 63] doctrine is neither mysterious nor pernicious; it rests upon the basic proposition that in order to assure the collection of federal revenue against competing claims, the tax lien created therefor by Congress is deemed to be fully perfected and specific as to all property and rights to property of a taxpayer. A competing lien cannot be rendered specific or perfected by a general declaration in a contract or a state statute; it must be so in fact, measured by federal standards. Thus, *City of Greenville*, like *New Britain*, discloses that the connection between the priority of the federal tax lien and the federal right to first payment under Section 3466 is supplied by the choate lien test; a competing lien does not raise any exception from Section 3466 unless it is choate, and it cannot compete with the federal tax lien on the basis of first-in-time, first-in-right, unless it is choate.

Pioneer American emphasizes that the three-strand choate lien test cannot be unraveled, in its restatement of *United States* v. *Ball Construction Co.,* 355 U. S. 587, rehearing denied, 356 U. S. 934, as "applying the choateness test to those seeking the protection of Section 6323 (a)." Hence, it follows that *United States* v. *Scovil,* 348 U. S. 218, was not decided on the ground that a landlord's lien is not entitled to the protection of recordation, but rather on the ground that the landlord's lien there was not choate. Accordingly, the landlord's claim in *Scovil,* a tax lien case, stands on the same footing as in *United States* v. *Waddill Co.,* 323 U. S. 353, a Section 3466 case, defeated in both cases because it was not choate. Finally, *Pioneer's* coupling of *New Britain* with *United States* v. *Security Tr. & Sav. Bank,* 340 U. S. 47; *Crest Finance Co.* v. *United States,* 368 U. S. 347; *United States* v. *Liverpool & London Ins. Co.,* 348 U. S. 215, and especially *United States* v. *Colotta,* 350 U. S. 808, suggests that the choate lien test is to be applied without distinction as to state tax liens, attachment and garnishment liens, factors' liens and mechanics' liens.

The assessment of a state tax giving rise to a general lien may supply two elements of a choate lien—the identity of the lienor and the amount of the lien—but it does not supply the third equally important element, the definiteness of the property to which the lien attaches. For the purposes of Section 3466 and the tax lien provisions of the Internal Revenue Code, a general state tax lien is not specific and perfected, but only a "*caveat* of a more perfect lien to come." *New York* v. *Maclay,* 288 U. S. 290, 294.

[fol. 64] For the foregoing reasons, it is respectfully requested, in the light of *Pioneer American,* that the petition for rehearing be granted and that the cause be set down for reargument at such time as this Court may deem proper.

Respectfully submitted, Louis F. Oberdorfer, Assistant Attorney General. Lee A. Jackson, Joseph Kovner, Attorneys, Department of Justice, Washington 25, D. C.

Joseph F. Radigan, United States Attorney. John H. Carnahan, Assistant United States Attorney.

June, 1963.

[fol. 65] APPENDIX

SUPREME COURT OF THE UNITED STATES

No. 405.—October Term, 1962

UNITED STATES, Petitioner,

v.

PIONEER AMERICAN INSURANCE COMPANY ET AL.

On Writ of Certiorari to the Supreme Court of Arkansas

June 10, 1963

Mr. Justice White delivered the opinion of the Court.

The United States has sought review of a decision of the Supreme Court of Arkansas subordinating the federal tax lien (26 U. S. C. § 6321) to a lien for attorney's fees included in an antecedent mortgage contract. Because of conflict between the Arkansas decision and *United States* v. *Bond*, 279 F. 2d 837 (C. A. 4th Cir.); *In re New Haven Clock & Watch Co.*, 253 F. 2d 577 (C. A. 2d Cir.), we granted certiorari. 371 U. S. 909.

When the taxpayers in 1958 acquired their interest in the parcel of real estate involved here, they assumed liability on a note and the deed of trust (first mortgage) securing it, which were held by respondent Pioneer American Insurance Company. The note obligated taxpayers "in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's [fol. 66] fee."[1] The taxpayers at the same time executed a

[1] The deed of trust provided, in addition:
"That if either party of the second part [trustee] or the party of the first part [mortgagor] shall become a party to any suit or proceeding at law or in equity in reference to its interest in the premises herein conveyed, the reasonable costs, charges and attorney's fees in such suit or proceeding shall be added to the principal sum then owing by the party of the first part and shall be secured by this

note and second mortgage to their vendor, respondent. The Development Company, and subsequently, in April 1960, the real estate became burdened again with a mechanic's lien in favor of Alfred J. Anderson.

In October of 1960, taxpayers defaulted on the first mortgage monthly installment and failed thereafter to meet payments as they fell due. On March 24, 1961, Pioneer American filed a suit to foreclose its mortgage and sought, in addition to the principal and interest, a reasonable attorney's fee. The United States was named a party defendant because of two outstanding federal tax liens against the taxpayers which were filed on November 29, 1960, and January 30, 1961. The United States admitted its liens were subordinate to the principal and interest on the first and second mortgages but claimed that the liens were superior to the claim for attorney's fee. Three additional federal tax liens subsequently were filed on April 14, July 17, and October 3, 1961.[2]

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instrument and the note secured hereby shall, at the option of the holder, become due and collectible."

* * * * * * *

"The proceeds of any sale under this deed of trust shall be applied . . . as follows:

"First: To pay the costs and expenses of executing this trust, and any and all sums expended on account of costs of litigation, attorney's fees, ground rents, taxes, insurance premiums, or any advances made or expenses incurred on account of the property sold, with interest thereon.

"Second: To retain as compensation, a commission as set forth by the laws of the State of Arkansas.

"Third: To pay off the debt secured hereby, including accrued interest thereon, as well as any other sums owing . . . . pursuant to this instrument."

[2] The federal tax liens, as of the date of the order of distribution, November 15, 1961, were as follows:

Lien of November 29, 1960	$ 659.67
Lien of January 30, 1961	1,661.03
Lien of April 14, 1961	1,344.69
Lien of July 17, 1961	1,653.23
Lien of October 3, 1961	1,164.04

On November 15, 1961, the Chancery Court entered its de- [fol. 67] cree of foreclosure which fixed the attorney's fee at $1,250 and determined the priority of the various claimants. After satisfaction of court and foreclosure sale costs, Pioneer American was accorded first priority for principal, interest and the attorney's fee; The Development Company took next on principal and interest under the second mortgage; Alfred J. Anderson shared thereafter on his mechanic's lien and the United States took last. The property was sold and proceeds were received which satisfied all claims except $3,615.28 of the federal tax liens.[3] The United States appealed to the Supreme Court of Arkansas asserting that it was entitled to priority over the attorney's fee,[4] and that $1,250 more should have been applied to reduce the unpaid federal taxes.[5] With one judge dissenting the Arkansas court rejected that contention and sustained the superiority of the attorney's fees.

It goes unchallenged that the claim for attorney's fees, arising out of the obligations assumed by the taxpayer in 1958, became enforceable under Arkansas law as a contract of indemnity at the time of default in October 1960 before the filing of the first federal tax liens. Furthermore, it is evident that the suit in which these attorney fees were earned was commenced on March 24, 1961, prior to the filing of the unpaid federal tax liens crucial to this suit, *i.e.*, the liens of April 14, July 17, and October 3, 1961.

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[3] The first two liens, November 29, 1960, and January 30, 1960, were satisfied in full. $546.68 was available for partial payment of the April 14, 1961, lien. The balance of the April lien and the full amounts of the July 16, and October 3, 1961, liens remained unsatisfied.

[4] The United States did not challenge the priority of the mechanic's lien or of any other distribution fixed by the decree.

[5] Once the attorney's fees are subordinated to the federal tax liens, the $1,250 would be borne by the other claimants in order of seniority among themselves under state law. On the basis of the present decree, the share of the mechanic's lienor Anderson would be eliminated and that of the second mortgagee, The Development Company, reduced in half.

Nevertheless, because these fees had not been incurred and paid and could not be finally fixed in amount until November 15, 1961, after all the federal liens had been filed, we [fol. 68] hold that the claim for attorney's fees remained inchoate at least until that date and that the federal tax liens are entitled to priority.

The priority of the federal tax lien provided by 26 U. S. C. § 6321 as against liens created under state law is governed by the common-law rule—"the first in time is the first in right." *United States* v. *New Britain*, 347 U. S. 81, 85-86. It is critical, therefore, to determine when competing liens, whether federal- or state-created, come into existence or become valid for the purpose of the rule.

The tax lien arises, according to § 6322, when the tax is assessed, but as against the specific interests mentioned in § 6323 (a)—mortgagees, pledgees, purchasers and judgment creditors—it is not valid until placed of public record, and insofar as the federal lien attaches to securities, mortgagees, pledgees and purchasers must have actual notice of the lien.[6] § 6323 (c).

As for a lien created by state law, its priority depends "on the time it attaches to the property and becomes choate." *United States* v. *New Britain, supra,* at 86; *United States* v. *Security Tr. & Sav. Bank,* 340 U. S. 47. Choate state-created liens take priority over later federal tax liens,

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[6] "While it is true that the filing of the notice of the tax lien may constitute notice in the case of real property, it is inequitable for the statute to provide that it constitutes notice as regards securities. For example, when a broker purchases a security for his customer on the exchange, it is obviously impossible for him to check all the offices in which a notice of the tax lien may be duly filed to determine whether the security is subject to such lien. A like situation exists with respect to over-the-counter and direct transactions in securities. An attempt to enforce such liens on recorded notice would in many cases impair the negotiability of securities and seriously interfere with business transactions. The adoption of the amendment will remove an existing hardship without causing any undue loss of revenue." H. R. Rep. No. 855, 76th Cong., 1st. Sess. 26 (1939).

United States v. *New Britain, supra; Crest Finance Co.* v. *United States,* 368 U. S. 347, while inchoate liens do not. See *United States* v. *Liverpool & London Ins. Co.,* 345 U. S. 215; *United States* v. *Scovil,* 348 U. S. 218; *United States* v. *Collatta,* 350 U. S. 808. And it is a matter of federal law when such a lien has acquired sufficient substance and has become so perfected as to defeat a later-arising or later-filed [fol. 69] federal tax lien.[7] "Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined." *United States* v. *New Britain, supra,* at 86. The federal rule is that liens are "perfected in the sense that there is nothing more to be done to have a choate lien . . . when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *Id.,* at 84.

We reject respondents' contention that the choateness rule has no place when a mortgage under § 6323 (a) is involved. The predecessor to § 6323 was first enacted by Congress in 1912 in order to protect mortgagees, purchasers and judgment creditors against a secret lien for assessed taxes and to postpone the effectiveness of the tax lien as against these interests until the tax lien was filed. H. R. Rep. No. 1018, 62d Cong., 2d Sess. The section dealt with the federal lien only and it did not purport to affect the time at which local liens were deemed to arise or to become choate or to subordinate the tax lien to tentative, conditional or imperfect state liens. Rather, we believe Con-

[7] "The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question. Hence, although a state court's classification of a lien as specific and perfected is entitled to weight, it is subject to re-examination by this Court." *United States* v. *Security Trust & Sav. Bank,* 340 U. S. 47, 49-50; see also, *United States* v. *Acri,* 348 U. S. 211; *United States* v. *Vorreiter,* 355 U. S. 15. Thus the fact that, under Arkansas law, the claim for attorney's fees becomes enforceable upon default as a contract of indemnity does not foreclose inquiry by this Court into the degree the claim is choate at that time.

gress intended that if out of the whole spectrum of state-created liens, certain liens are to enjoy the preferred status granted by § 6323, they should at least have attained the degree of perfection required of other liens and be choate for the purposes of the federal rule.

The Court has never held that mortgagees face a less demanding test of perfection than other interests when competing with the federal lien. Indeed *United States* v. *Ball Constr. Co.*, 355 U. S. 587, stands for just the contrary. There the state law creditor, asserting that the assignment [fol. 70] under which he claimed was mortgage within the predecessor to § 6323, insisted upon priority over the federal lien by virtue of the previously executed assignment. A majority of the Court, although not expressly declaring the assignment to be a mortgage, held that § 6323 (a) afforded the creditor no protection since his interest was "inchoate and unperfected." The four dissenters thought the assignment was a mortgage and that it was "completely perfected" and "in all respects choate." While disagreeing on the choateness of the particular assignment involved there, the Court was unanimous in applying the choateness test to those seeking the protection of § 6323 (a). We follow that lead here and therefore proceed to measure against the rule, the choateness of the mortgagee's lien for reasonable attorney's fees before us.

Clearly the identity of the lien holder and the property subject to the lien are definite here, but it is equally apparent that the amount of the lien for attorney's fees was undetermined and indefinite when the federal tax liens in question were filed.[8] The mortgage held by respondents secured a promissory note which obligated the mortgagor maker to pay a "reasonable attorney's fee in the event of default" and "of placing of the note in the hands of an attorney for collection." By the time the federal liens subordinated by the Arkansas courts were placed of public

[8] There is nothing in *Security Mortgage Co.* v. *Powers*, 278 U. S. 149, which compels us to hold the lien choate since the issue there was the status of an attorney's fee clause, fixed in amount, in bankruptcy proceedings where the rigorous federal lien choateness test was not necessarily applicable.

record, default had occurred, the mortgagee had elected to declare the note due and payable, an attorney had been engaged and a suit to foreclose the mortgage had been filed. But the "reasonable attorney's fee"—reasonable in relation to the service to be performed by the attorney—had not been reduced to a liquidated amount. The final amount was to be established by court decree and the Chancery Court set the fee considerably below the sum requested. Moreover, there is no showing in this record that the mortgagee had become obligated to pay and had paid any sum of money for services performed prior to the filing of the federal tax lien.

[fol. 71] *Ball* once again provides a parallel. Sums due the contractor-taxpayer under a particular construction contract were assigned to the surety as security for any future indebtedness of the contractor to the surety arising under that contract or any other. After the filing of the federal tax lien against the contractor, the surety made advances to complete another contract of the taxpayer, as the surety was obligated to do under its bond issued on that contract, and the taxpayer thereby became indebted to the surety. The majority held the surety's interest "imperfect and inchoate" at the time of the filing of the federal tax liens.[9] *Ball* therefore rejects as inchoate an assignee's or mortgagee's lien to secure future indebtedness of the taxpayer-debtor. The creditor holds "merely a *caveat* of a more perfect lien to come." *New York* v. *Maclay*, 288 U. S. 290, 294. Likewise, when a mortgagee has a lien for an attorney's fee which is uncertain in amount and yet to be incurred and paid, such a lien is inchoate and is subordinate to the intervening federal tax lien filed before the mortgagee's lien for attorney's fee matures.[10]

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[9] Contrast *Crest Finance Co.* v. *United States*, 368 U. S. 347, where the assignment and the loans were consummated prior to the accrual and filing of the federal tax liens.

[10] See in accord, with respect to attorney's fees, *United States* v. *Bond*, 279 F. 2d 837 (C. A. 4th Cir.); *In re New Haven Clock & Watch Co.*, 253 F. 2d 577 (C. A. 2d Cir.); *Bank of America* v. *Embry*, 188 Cal. App. 2d 425, — P. 2d —; with respect to payments of subsequently attaching local taxes, *United States* v. *Bond*, *supra*; *United States* v.

But, it is said, the principal and interest of the mortgage were definite in amount, the attorney's fee later became certain by court order [11] and if the tax lien were to prevail the preference of the mortgagee given by § 6323 will be frustrated since payment of the attorney's fee will reduce the net amount realized from the mortgage. Aside from [fols. 72-73] the fact that the mortgagee here will experience no such reduction,[12] this argument would subordinate federal tax liens to inchoate liens and in both *United States* v. *New Britain* and *United States* v. *Buffalo Savings Bank*, 371 U. S. ——, the Court denied priority to local tax liens which were imperfect when the federal tax lien was filed even though the former had priority over the mortgage and would reduce the recovery of the mortgagee.[13]

The court below was in error and its judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice Douglas dissents.

Christensen, 269 F. 2d 624 (C. A. 9th Cir.); and with respect to future advance clause transactions, *American Surety Co.* v. *Sundberg*, 58 Wash. 2d 337, 363 P. 2d 99; Rev. Rule 56-41, 1956-1 Cum. Bull.; cf. *United States* v. *Peoples Bank*, 197 F. 2d 898 (C. A. 5th Cir.); *Hoare* v. *United States*, 294 F. 2d 823 (C. A. 9th Cir.).

[11] This argument would require us to revitalize the long since rejected relation-back doctrine. See *United States* v. *Security Trust & Sav. Bank*, 340 U. S. 47, 50.

[12] See note 5, *supra*.

[13] By the same token respondents' contention that the rules against "unjust enrichment" are violated by preferring the tax lien to the claim for attorney's fees is without merit. Both *New Britain* and *Buffalo Savings Bank* prefer the federal lien even though the mortgagee's interest in the proceeds will be reduced by later-arising local taxes having priority under state law over the mortgagee. The attorney's services, moreover, were rendered for the benefit of the mortgagee to protect his interest in the property, and the United States, holding an adverse interest, received no such benefit from them that its interest is to be charged therefor.

[fols. 74-75] IN THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—July 3, 1963.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro Clerk. By Vincent A. Carlin, Chief Deputy Clerk.

[fol. 76] Clerk's certificate to foregoing transcript (omitted in printing.)

[fol. 77] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—December 9, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 716087 580

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CITATIONS

Cases:

707-067—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

THE STATE OF VERMONT; CUTTING & TRIMMING, INC.; CHITTENDEN TRUST COMPANY OF BURLINGTON; RAINBOW CHILDREN'S DRESS COMPANY OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the district court (R. 22–30) is reported at 206 F. Supp. 951. The opinion of the court of appeals (Appendix A, *infra,* pp. 14–30) is reported at 317 F. 2d 446.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1963 (App. A, *infra,* p. 31). On July 3, 1963, the court of appeals (1) granted the government's motion for leave to file an untimely petition

for rehearing, and (2) denied the petition (App. A, *infra*, pp. 32–33; see note 1, *infra*, p. 4).

QUESTION PRESENTED

Whether the standards which this Court has developed for determining whether a state-created lien is sufficiently perfected so that it has priority over a federal tax lien are applicable for deciding the priority of a state tax lien asserted against a non-insolvent taxpayer.

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 and the Vermont Statutes Annotated are set forth in Appendix B, *infra*, pp. 34–35.

STATEMENT

On October 21, 1958, the State of Vermont made an assessment and demand on Cutting & Trimming, Inc. for state income taxes of $1,628.15 which the company had withheld from wages paid to its employees. The pertinent Vermont statute (32 V.S.A. Section 5765, App. B, *infra*, p. 35) provides that if an employer who is required to deduct and withhold a tax from an employee's wages fails to pay the same after demand, "the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such employer," and further that "Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable."

On May 21, 1959, the State instituted suit in a state court against Cutting & Trimming and Chittenden Trust Company, a Vermont bank in which Cutting & Trimming had $1,878.82 on deposit, of which $600 had already been attached by Rainbow Children's Dress Company. On October 23, 1959, the state court entered judgment for Vermont against Cutting & Trimming for $4,049.22 (which included other tax assessments not here relevant), and against Chittenden Trust Company for $1,278.82 (App. A, *infra*, pp. 15–16).

Prior to the filing of the state court suit—but subsequent to the State's assessment and demand—the Commissioner of Internal Revenue on February 6, 1959, made an assessment of $5,365.96 against Cutting & Trimming for 1958 taxes under the Federal Unemployment Tax Act. In 1961, the United States brought the present action against Cutting & Trimming, the State of Vermont, and others, to establish Cutting & Trimming's tax liability, and to foreclose its tax lien against the property of Cutting & Trimming held by the trust company. The answer of the State of Vermont alleged that the October 21, 1958, assessment gave its lien priority over the federal lien. On cross-motions for judgment on the pleadings, the district court held that the State of Vermont's tax lien had priority over the federal lien, and directed the trust company to apply the $1,878.82 first to the payment of principal and interest on the State's tax lien, and to pay any balance to the United States. (App. A, *infra*, p. 16).

The court of appeals affirmed. The court ruled that under the standards which this Court has applied for determining the relative priority of federal and state tax liens under Section 3466 of the Revised Statutes (now 31 U.S.C. 191) where the taxpayer is insolvent, the general lien of the State of Vermont upon all the taxpayer's property was not sufficiently perfected to prevail over the federal lien (App. A, *infra*, p. 18); that a different standard for determining whether the state lien is perfected applies, however, when the federal priority is asserted under the lien provisions of the Internal Revenue Code against a non-insolvent taxpayer (*id.*, pp. 18–30); and that under this Court's decision in *United States* v. *New Britain*, 347 U.S. 81, "[i]t would seem that if the general federal tax lien under §§ 6321 and 6322 is thus sufficiently 'choate' to prevail over a later specific local tax lien, a general state tax lien under an almost identically worded statute must also be 'choate' enough to prime a later and equally general federal tax lien under Chief Justice Marshall's 'cardinal rule' of 'first in time, first in right', in the absence of contrary direction by Congress" (*id.*, at 25).

REASONS FOR GRANTING THE WRIT[1]

The court of appeals, in denying the federal tax lien priority over the tax liens of the State of Vermont, has decided an important question of federal

[1] The petition in this case is timely. "The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial

law in a way that misapplies the decisions of this Court, and in conflict with a decision of the Supreme Court of Washington.

1. This Court has repeatedly held that a State-created lien does not have priority over a subsequent federal tax lien unless, at the time the federal tax lien attached, the state lien was already perfected or "choate." This doctrine was originally developed in cases which held that a general state tax lien upon all of a taxpayer's property was not sufficiently perfected to defeat the priority which Section 3466 of the Revised Statutes gave in cases of insolvency to all debts due to the United States (including taxes). *Spokane County* v. *United States*, 279 U.S. 80; *New York* v. *Maclay*, 288 U.S. 290; *United States* v. *Texas*, 314 U.S. 480; *Illinois* v. *Campbell*, 329 U.S. 362. In *United States* v. *Security Trust and Savings Bank*, 340 U.S. 47, the principle was applied to determine

court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof." *Bowman* v. *Loperena*, 311 U.S. 262, 266 (footnote omitted); see, also, *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211.

The present case comes squarely within the foregoing principles. Following the entry of the court of appeals' judgment on May 9, 1963, the government filed a motion for leave to file an untimely petition for rehearing, in which it called attention to this Court's intervening decision in *United States* v. *Pioneer American Insurance Co.*, 374 U.S. 84. The court of appeals granted leave to file the petition, but denied it on the merits. App. A, *infra*, pp. 32–33. The petition for certiorari is being filed within 90 days of such denial of rehearing on July 3, 1963.

the priority of a federal tax lien under the general lien provisions of the Internal Revenue Code. The Court there pointed out (p. 51) that in cases under the "kindred matter" of the insolvency statute (Section 3466) "it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it"; and it concluded (*ibid.*) that "[i]f the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here." The Court therefore held that a federal tax lien was superior to an attachment lien which had attached prior to the federal lien but subsequent to the time the attaching creditor obtained judgment.

Since that decision, this Court repeatedly has applied the principle, reiterated last Term in *United States* v. *Pioneer American Insurance Co.*, 374 U.S. 84, 88, that only "[c]hoate state-created liens take priority over later federal tax liens."

A state lien is not choate as against the federal lien, however, unless and until three conditions have been satisfied: "when [1] the identity of the lienor, [2] the property subject to the lien, and [3] the amount of the lien are established." *United States* v. *New Britain*, 347 U.S. 81, 84, quoted with approval in *Pioneer, supra,* at 89. The second requirement for choateness—the establishment of "the property subject to the lien"—requires that "[t]he lien must attach to specific property of the debtor." *Illinois*

v. *Campbell*, 329 U.S. 362, 373. In the *Campbell* case a state tax lien upon all of a taxpayer's property was held to be "not so specific and perfected as to defeat the priority of [the tax claim of] the United States" under Section 3466 of the Revised Statutes, even though the state had already secured the appointment of a receiver of the insolvent taxpayer's property at the time the federal lien attached. See, also, *United States* v. *New Britain*, 347 U.S. 81, 84, 86–87 (emphasis added) where the Court, in a non-insolvency case, "accept[ed] the holding [of the state court] as to the specificity of the City's liens *since they attached to specific pieces of real property* for the taxes assessed and water rent due"; and held that such liens had priority over the federal tax liens under the rule of first-in-time, first-in-right, since they "apparently *attached to the specific property and became choate* prior to the attachment of the federal tax liens."

The court of appeals in the present case correctly ruled that under the foregoing authorities the federal tax lien would have had priority over the Vermont lien if the case had arisen under Section 3466. While the Vermont lien came into being when the State assessed and demanded the tax—which was prior to the federal tax lien—the State's lien was not then perfected because it did not attach to specific property of Cutting & Trimming, but was only a general lien upon all of that company's property. Although the State of Vermont subsequently took steps to perfect its lien by attaching the bank account in question,

such suit was not instituted until after the federal tax lien had arisen and had been recorded. The State lien therefore did not meet one of the three essential elements of a choate lien; that it attach to specific property.

The court of appeals concluded, however, that a different rule governs the priority of state and federal tax liens where, as here, the federal priority rests upon the lien provisions of the Internal Revenue Code rather than upon Section 3466 of the Revised Statutes. It reasoned that if, as *New Britain* teaches, the federal lien upon all of a taxpaper's property is "perfected in the sense that there is nothing more to be done to have a choate lien" (347 U.S. at 84), a state tax lien upon all of a taxpayer's property is similarly perfected. This conclusion, we submit, fails to give appropriate weight to the underlying rationale of the decisions of this Court in which the choateness test was developed, and to the basic Congressional policy of protecting federal revenues which that doctrine is designed to implement.

In the first case under the insolvency statute in which the choateness doctrine was applied (*Spokane County* v. *United States*, 279 U.S. 80), the question was whether state taxes assessed against an insolvent prior to the appointment of a receiver, and which under state law constituted a lien upon all the taxpayer's property, had priority over taxes due to the United States, but not yet assessed. The State contended that the priority which Section 3466 gave to debts due to the United States did not apply as against a secured claimant (see 279 U.S. at 81). The

Court found it unnecessary to decide this question, however. It ruled that since the State had not taken the necessary statutory steps to perfect its assessment lien (*i.e.*, "seizure, distraint or other specific proceedings," 279 U.S. at 93-94), its claim was merely that of an unsecured creditor; and that the federal debts had priority over such unsecured claims under Section 3466. The Court quoted with approval the following statement of the concurring judge in the state court: "[N]either the United States, the state of Washington nor Spokane County for the state of Washington has ever, by the prescribed statutory procedure, perfected its inchoate tax lien right against any of the property of which the funds here in question are the proceeds" (279 U.S. at 94).

Four years later, in *New York* v. *Maclay*, 288 U.S. 290, the Court again found it unnecessary to decide whether "a perfected lien upon the property of the insolvent at the date of the receivership" would have priority under Section 3466 over a federal claim for taxes, since it again held that a State's tax liens were "not so perfected or specific as to change the rule of distribution" (288 U.S. at 292). In *United States* v. *Texas*, 314 U.S. 480, and *Illinois* v. *Campbell*, 329 U.S. 362, the Court similarly held that the mere assessment of State taxes without the taking of further steps to perfect the liens, did not create a sufficient perfected local lien to require resolution of the question whether a choate state lien would defeat the federal priority in insolvency. And, as noted above, the reason why the general local liens were held not perfected in *Campbell* was because they had not "at-

tach[ed] to specific property of the debtor" (329 U.S. at 373).

In sum, the rationale of the cases in which the choateness test was developed was that a general local lien upon all of a taxpayer's property, although valid against other State-created interests, was not valid against the claims of the federal government. As against such claims, which were given priority by the insolvency statute, the state lien was ineffective to give the State any position other than that of a general unsecured creditor. It is difficult to see why the result should be any different where the federal claim to priority rests upon the tax lien statute rather than upon the insolvency statute. Indeed, it would seem anomalous if a general state lien was viewed as not sufficiently perfected to have priority over an *unsecured* federal debt (which was the status of the tax claims involved in the insolvency cases) but nevertheless was sufficiently perfected to prevail over a *secured* tax claim. It is therefore not surprising that, when this Court faced the question in the *Security Trust* case, *supra*, it held that the choateness test enunciated in the insolvency cases was also applicable in cases arising under the lien provisions of the Internal Revenue Code—a view which it has since followed.

Admittedly, at first glance it may seem anomalous to say that a federal tax lien upon all a taxpayer's property is, without more, choate, but that a general state tax lien, framed in the same terms, is inchoate because it has not yet attached to specific property. This seeming anomaly, however, reflects only the fact

that Congress, in order to accomplish "the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents" (*Security Trust, supra,* 340 U.S. at 51), has given the federal tax lien a priority which State tax liens do not enjoy.[2] As this Court recognized in *New Britain,* the federal lien, although general, is perfected. A comparable State lien, however, is not perfected so as to prevail over the federal lien unless it satisfies the criteria of choateness, one of which is that it must have attached to specific property before the federal lien came into existence. The Vermont lien involved in the present case had not so attached, and it therefore is subordinate to the federal lien.

2. The decision below is in conflict with the decision of the Washington Supreme Court in *Weitz* v. *Electrovation, Inc.,* 48 Wash. 2d 604, 295 P. 2d 728. In that case, the Washington Supreme Court had to determine whether the State's tax and other liens, which attached to all of the taxpayer's property upon assessment, had priority over federal tax liens asserted

[2] Cf. *United States* v. *Bradley*, decided August 8, 1963, — F. 2d —, 1963–2 U.S.T.C., par. 9657, in which the Fifth Circuit held that in bankruptcy the choate lien test is not applicable to state tax liens because Section 64(a) of the Bankruptcy Act (11 U.S.C. 104(a)) accords parity to unsecured federal, state and local tax claims, and Section 67(b) of the Bankruptcy Act (11 U.S.C. 107(b)) validates federal and state tax liens arising or perfected while the debtor is insolvent. The court accordingly held that general tax liens for Mississippi state sales taxes and county personal property taxes which had not yet attached to any specific property of the taxpayer were superior to later-assessed federal taxes, and entitled to prior payment in bankruptcy.

under the Internal Revenue Code. The court referred to a prior decision in which it "held that the lien which the state acquires upon the property of a taxpayer for unpaid occupation taxes through the filing of warrants is only an inchoate, general lien, which can become specific only by distraint or levy of execution" (48 Wash. 2d at 609, 295 P. 2d at 731); and it held that since the state liens had not "become specific and perfected prior to the effective date of the Federal liens" (48 Wash. 2d at 610, 295 P. 2d at 732), the latter had priority.

The Washington court of appeals thus specifically held in the *Weitz* case that a general state tax lien upon all of the taxpayer's property was not sufficiently "specific and perfected" to defeat a similar federal tax lien asserted under the Internal Revenue Code. The court of appeals in the present case, however, has held that a comparable general state tax lien does have priority over the federal lien.

3. The question is an important one in the administration of the internal revenue laws which this Court should decide. Many states and their subsidiaries give local governments a lien on all of a taxpayer's property for unpaid taxes upon assessment and demand, or when the taxes become payable.[3] The decision below, if allowed to stand, will

[3] See, *e.g.*, in addition to the state tax statutes involved in the *Campbell* and *Maclay* cases, *supra*, which are still in force (Smith-Hurd Illinois Annotated Statutes, c. 48, Sec. 243; McKinney's Consolidated Laws of New York Annotated, Book 59, Sec. 197), Iowa Code Annotated, Sec. 422.26, which provides with respect to income, corporation and sales taxes that the amount of the tax "shall be a lien in favor of the state upon

understandably have a significant impact upon the application of such statutes to property against which both the federal government and the states claim priority for their tax liens. At a minimum, the decision is almost certain to produce a substantial volume of litigation in other courts. Review by this Court is therefore appropriate.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

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Attorney.

SEPTEMBER 1963.

all property and rights to property, whether real or personal, belonging to said taxpayer"; Tennessee Code Annotated, Vol. 12, Sec. 67-2928, which provides for a franchise tax lien "upon all the property of such taxpayer against whom the same is assessed." Both New Jersey and Pennsylvania provide that all state taxes imposed on corporations constitute a lien upon all the corporation's property. See New Jersey Statutes Annotated, Title 54, Sec. 10A-16; Purdon's Penna. Statutes Annotated, Title 72, Sec. 3342.

APPENDIX A

United States Court of Appeals for the Second Circuit

No. 272

October Term, 1962

United States of America, appellant

v.

The State of Vermont; Cutting & Trimming, Inc.; Chittenden Trust Company of Burlington; Rainbow Children's Dress Company of New York, appellees

Argued April 11, 1963. Decided May 9, 1963

Docket No. 27779

Before: Moore, Friendly and Hays, *Circuit Judges.*

Friendly, *Circuit Judge:*

This case raises a question in the vexed field of federal tax lien priority not squarely ruled by any of the numerous decisions of the Supreme Court. It involves a conflict between a state tax assessment, definite in amount, which became a lien on all of a taxpayer's property but did not relate to specific assets, and a later federal tax assessment with precisely the same attributes, in a situation to which the federal priority-in-insolvency statute, R.S. § 3466, now codified in 31 U.S.C. § 191, is not in terms ap-

plicable. The District Court for Vermont upheld the priority of the state tax lien, 206 F. Supp. 951. We agree.

The circumstances giving rise to the controversy are these:

The Vermont statutes provide, 32 V.S.A. § 5765, that if an employer who is required to deduct and withhold a tax from an employee's wages fails to pay the same after demand, "the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such employer," and further that "Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable." The lien becomes valid "as against any subsequent mortgagee, pledgee, purchaser or judgment creditor" once notice is filed with the clerk of the town, city or, in some instances, county where the property is situated. On October 21, 1958, Vermont made an assessment and demand on Cutting & Trimming, Inc. for $1,628.15 for withholding taxes due for the third quarter of 1958; it filed notice of lien on October 30 with the city clerk of Burlington. On May 21, 1959, it instituted suit in a state court against Cutting & Trimming, Inc., and joined Chittenden Trust Co., a Burlington bank, as a defendant. In consequence of a writ served on May 25, Chittenden Trust Co. disclosed that it had in hand $1,278.82 owing to Cutting & Trimming plus another $600 previously attached by Rainbow Children's Dress Company. On October 23, 1959, judgment was entered for Vermont against Cutting & Trimming for $4,049.22—this including other assess-

ments not here relevant—and against Chittenden Trust Co. for $1,278.82.

Meanwhile, on February 9, 1959, the Commissioner of Internal Revenue made an assessment of $5,365.96 against Cutting & Trimming for 1958 taxes under the Federal Unemployment Tax Act. Under §§ 6321 and 6322 of the Internal Revenue Code of 1954, this amount thereupon became "a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." On June 2, 1959, notice of lien was filed pursuant to § 6323 of the Code.

Later, in 1961, the United States brought this action against Cutting & Trimming, Chittenden Trust Co., the State of Vermont, and Rainbow Children's Dress Company, to establish the indebtedness of Cutting & Trimming for taxes in a larger amount than the February 9, 1959, assessment, and to foreclose its lien against the property of Cutting & Trimming held by the trust company ahead of Vermont's lien. Vermont's answer alleged that its lien had priority as a result of the October 21, 1958, assessment.[1] On cross-motions for judgment on the pleadings, the District Court decreed that Chittenden Trust Co. apply the $1,878.52 held by it first to the principal and then to the interest of Vermont's lien, with any balance payable to the United States, and directed, under F.R. Civ. Proc. 54(b), that this be a final judgment as to the trust company and the state.

In defending against the appeal of the United States from this judgment, Vermont relies on the

[1] Vermont does not, and could not, rely on its status as a judgment creditor under the October 23, 1959, judgment in the state court, since notice of the federal lien had been filed prior to that time. See 26 U.S.C. § 6323 (§ 3672 of Internal Revenue Code of 1939).

principle that, at least as between liens of the same sort, the first in time is the first in right. It emphasizes that its lien, which predated the federal lien, was in every other material respect identical to it. The state lien, like the federal, attaches to "all property and rights to property, whether real or personal, belonging to" the taxpayer, arises "at the time the assessment * * * is made," and is valid once notice has been filed as against any subsequent "mortgagee, pledgee, purchaser, or judgment creditor." 32 V.S.A. § 5765; 26 U.S.C. §§ 6321–6323. The *verbatim* similarity is not a coincidence; as Judge Gibson pointed out, 206 F. Supp. at 956, the Vermont legislation was avowedly modeled on the Internal Revenue Code. Enforcement also is similar; Vermont, like the federal government, could have enforced its lien on the fund here at issue either by a civil action in the courts or by direct seizure and public sale.[2] Against this the United States argues that the first in time principle is inapplicable because (1) decisions of the Supreme Court have established that the federal lien would prime Vermont's if Cutting & Trimming had been insolvent so that the federal priority-in-insolvency statute, 31 U.S.C. § 191 (former R.S. § 3466), would have come into play, and (2) the same principle should be—or at any rate has been—applied when the Government relies only on the tax lien statutes, §§ 6321–23 of the Internal Revenue Code.

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[2] Section 7403 of the Internal Revenue Code provides for enforcement of a federal tax lien by civil action; §§ 6331–6344 provide for seizure and sale. Although Judge Gibson did not fully develop the statutory basis for his statement that public sale as well as civil action would be an available means of enforcing Vermont's lien, 206 F. Supp. at 953, see also 955, the proposition seems entirely sound. In 1958, when this case arose, the controlling provision was 32 V.S.A. § 5767, which states that "The lien provided for by section 5765 of this title may

The Government's first proposition is beyond successful challenge. In cases governed by R.S. § 3466, the Supreme Court has upheld the priority of United States tax claims against an Illinois tax lien, arising prior to the Government's, which we find indistinguishable from Vermont's here, *Illinois* v. *Campbell,* 329 U.S. 362, 370–76 (1946), and even against an antecedent lien for state property taxes assessed upon certain machinery owned by the taxpayer, *United States* v. *Gilbert Associates, Inc.,* 345 U.S. 361 (1953). It is the Government's second proposition that is debatable.

Considering the two statutes solely on the basis of their language and purpose, we find nothing that calls for identical results and much that leads to different ones. R.S. § 3466, which goes back to 1796, 1 Stat. 515, says, in the strongest possible terms, that "Whenever any person indebted to the United States is insolvent * * * debts due to the United States shall

be foreclosed in the case of real estate agreeably with the provisions of law relating to foreclosure of mortgages on real estate, and in the case of personal property, agreeably with the provisions of law relating to the foreclosure of chattel mortgages." While the provisions relating to foreclosure of mortgages on real estate apparently allow this to be done only by bill or petition in equity, see 12 V.S.A. §§ 4521 *et seq.*, chattel mortgages can be foreclosed as well by direct public sale, 9 V.S.A. §§ 1793–1797; hence that remedy would have been available here as to the money held by the bank.

In 1959 Vermont strengthened these provisions by enacting 32 V.S.A. § 5763, which makes applicable to the employers' withholding tax here involved "the provisions * * * of chapter 155 of this title." Those provisions include 32 V.S.A. § 6067, which provides that "When a tax * * * is not paid within sixty days after the same becomes due, the commissioner shall issue a warrant * * * to the sheriff * * * commanding him to levy upon and sell the real and personal property of the taxpayer * * *."

be first satisfied." In cases to which it applies, it gives this prime position to all "debts due to the United States," whether liens or not; the only issue in such cases is how far the words of the statute should be restricted by withdrawing from their sweep property of the insolvent upon which a rival claimant has secured a "lien".[3] It is in this connection that the Supreme Court has developed the rule that a lien contesting against the priority of the United States cannot escape the literal impact of R.S. §3466 unless at "the crucial time" it was "definite, and not merely ascertainable in the future by taking further steps," as to the identity of the lien or; the amount of the lien, and the property to which it attaches, *Illinois* v. *Campbell, supra*, 329 U.S. at 375; whether a lien passing even this severe test will in fact escape the breadth of R.S. § 3466, the Court has not decided. *Spokane County* v. *United States*, 279 U.S. 80 (1929); *New York* v. *Maclay*, 288 U.S. 290 (1933); *United States* v. *Texas*, 314 U.S. 480 (1941); *United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U.S. 353 (1945); *Illinois* v. *Campbell, supra; United States* v. *Gilbert Associates, Inc., supra;* see Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 Yale L.J., 905, 911–19 (1954). In contrast, the federal tax lien statutes, which trace their ancestry to 1865, 13 Stat. 470–71, and were re-enacted for the first time in 1866, 14 Stat. 107, have remained silent for nearly a century on the very issue as to which R.S. § 3466 has spoken so clearly, since the earliest

[3] If the rival claimant has attained the status of "mortgagee, pledgee, purchaser, or judgment creditor," he then prevails, under 26 U.S.C. § 6323 (formerly § 3672 of the 1939 Code), against even an antecedent federal tax lien, if notice thereof has not been previously filed.

days; they say nothing to create a priority for tax liens of the United States over similar but earlier tax liens of the states or municipalities. This silence of the law-makers of 1865–66 becomes more eloquent when the language of the tax lien statutes is contrasted with the Bankruptcy Act of 1867, 14 Stat. 517, 531, passed by the same Congress that had re-enacted the former legislation and by many of the same Congressmen who had passed it originally. Section 28 of the Bankruptcy Act gave priority, immediately after administration expenses, to "All debts due to the United States, and all taxes and assessments under the laws thereof", these being ranked ahead of "All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such State." Thus, when the Congress of those days wished to prefer the federal government, it knew how to say so.[4] Furthermore, it was not until *United States v. Security Trust & Savs. Bank, infra,* decided in 1950, that Congress could have had any reason to suppose that what it had failed to say with respect to priority in the tax lien legislation of the 1860's would be supplied for it by judicial construction.

With this background, one would think it fairly plain that ~~when~~ a tax lien of the United States encounters a state tax lien of precisely the same nature,

4 See also § 5004(a)(1) of the Internal Revenue Code of 1954. This statute, which provides explicitly that the federal lien for taxes on distilled spirits shall be a "first lien" on the property to which it attaches, was first enacted in 1868, 15 Stat. 125. The enactment afforded protection to prior lienors whose liens would thereby be outranked by requiring that waivers of their priority be obtained before a distiller could obtain the performance bond necessary for legal entry into the distilling business. 15 Stat. 128, § 5177(b)(2) of the Internal Revenue Code of 1954.

the case would be governed by the "cardinal rule" laid down by Chief Justice Marshall in *Rankin & Schatzell* v. *Scott,* 12 Wheat. (25 U.S.) 177, 179 (1827):

> The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant.

Arguing against this, the Government tells us that "In the collection of its revenue the Federal Government must necessarily have supremacy over the states (and the numerous local tax authorities deriving their power from those states)," since "the Federal Government is not in a position * * * to match the timing of the innumerable state and local tax liabilities." Whatever force such an argument might or might not have with Congressmen, who after all are not without some local allegiances, the Government points to nothing in the language or history of the tax lien statutes to show that Congress entertained the purpose thus attributed to it. Moreover, the change in the priority provisions of the Bankruptcy Act made in 1898, 30 Stat. 563, and continued to this day, § 64, 11 U.S.C. § 104, whereby claims of states and their subdivisions, even when they have not become liens at the critical date, were elevated to the same rank as similar tax claims of the United States, casts doubt on the existence of the policy here claimed.

The Government quite rightly reminds us that, however all this may be, we are not reading from a clean slate but from one that bears copious writing by the Supreme Court. This begins, for present purposes, with *United States* v. *Security Trust & Savs. Bank,* 340 U.S. 47 (1950)—a case in which, as has been

pointed out, the Court was "without benefit of a brief for the respondent."[6] The decision, which established priority of the federal tax lien over that arising from an attachment under a California statute permitting a plaintiff to attach the property of a defendant at any time "as security for the satisfaction of any judgment that may be recovered", is plainly distinguishable from the instant case. Although the attachment had preceded the date of the federal lien, judgment had not, and the Supreme Court of California itself had said that "The attaching creditor obtains only a potential right or a contingent lien * * *", which, depending on the eventualities of his lawsuit, might never come into effect; the rule of "first in time, first in right" surely need not be read so broadly as to permit a state to place someone in the "first" position by resort to the fictional doctrine of "relation back." But Mr. Justice Minton went on to say:

> In cases involving a kindred matter, i.e., the federal priority under Rev. Stat. § 3466, it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it. [Citing Illinois v. Campbell, *supra*.] If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here.

To us this falls considerably short of saying, as the Government asserts, that the entire body of law holding that certain liens had not reached the level required to raise the question whether they might overcome the priority expressly accorded the United States

[6] Brown, The Supreme Court 1957 Term—Foreword: Process of Law, 72 Harv. L. Rev. 77, 84 n. 37 (1958).

by R.S. § 3466, was transplanted to the Federal tax lien statutes which by their terms accorded none. We read it as saying only that, just as the § 3466 priority could not be overcome by a state's baptizing as a lien something which in fact was "merely a lis pendens notice that a right to perfect a lien exists", 340 U.S. at 50, the rights of the federal government under the tax lien statutes likewise could not be.

That Mr. Justice Minton did not mean to say in *Security Trust* what the Government says he did, was made quite clear four years later in *United States* v. *New Britain*, 347 U.S. 81 (1954). There, in upholding the liens of city real estate taxes and water rents insofar as these had attached before the federal tax assessments, he sharply distinguished the situation where "the debtor is insolvent" and hence "all the property of the debtor is involved," in which case "Congress has expressly given priority to the payment of indebtedness owing the United States * * *, by § 3466 of the Revised Statutes" from the situation "where the debtor is not insolvent", in which case "Congress has failed to expressly provide for federal priority, * * * although the United States is free to pursue the whole of the debtor's property wherever situated." *Id.* at 85.[6] In the latter situation, the Court held, "priority of these statutory liens is de-

[6] The Court's next sentence, "The State, having a lien only upon property within its boundaries, may not reach beyond the state line to fasten its lien upon other property," may be thought to run exactly counter to the Government's contention, noted above, that the tax collection problems of the United States require a reading of the tax lien statutes that would prefer its liens to similar but earlier state or local tax liens.

termined by another principle of law, namely, 'the first in time is the first in right'." *Ibid.*[7]

Indeed, *New Britain* would unquestionably decide this case in favor of Vermont but for one circumstance, the crucial character of which the Government contends to have been recognized in *New Britain* itself. This is that the city liens for taxes and water rents that were there preferred over the federal tax liens "attached to specific pieces of real property." 347 U.S. at 84. We thus are confronted with the not uncommon question whether, when the Supreme Court

[7] The *New Britain* decision would seem to have definitively rejected one argument, not advanced in this Court, that would sustain the Government's position here. This is the view, taken by Mr. Justice Jackson's concurring opinion in *Security Trust*, 340 U.S. at 51, that the statute which is now § 6323 of the Internal Revenue Code of 1954 and was formerly § 3672 of the 1939 Code, see note 3 *supra*, by protecting the rights of mortgagees, pledgees, purchasers, and judgment creditors whose interests arise even after the federal tax lien where the latter has not been recorded, has the effect of subordinating all lienors who cannot bring themselves within one of those four categories even though their liens arise prior to the federal tax lien. The legislative history and purpose of the statute make the argument quite untenable, as is pointed out by Professor Brown in the comment cited in note 5 *supra*, 72 Harv. L. Rev. at 84–85 & n. 39, and as Mr. Justice Jackson himself, by concurring in the Court's opinion in *New Britain*, apparently later recognized. The argument was heavily pressed upon the Court by the Government in *New Britain*, see its Brief at 6–7, 13, 22–24, and its Reply Brief at 7, but was demolished by Professor Kennedy as counsel for New Britain. See Supplemental Brief for Respondent at 10 n. 16, 11–12, 13–14. The Court's decision in favor of the city's prior liens must be taken to have rejected it, since Mr. Justice Minton's opinion for the Court in *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361 (1953), makes clear that *New Britain* could not have been considered a "judgment creditor" within the terms of former § 3672, and there was no other way in which the city could bring itself within that section.

has mentioned a factor as one of several leading to a decision, this is to be regarded as critical. Cf. *Larios* v. *Victory Carriers, Inc.*, — F. 2d —, — (2 Cir. 1963). Illumination on that issue here is shed by another portion of the *New Britain* opinion dealing with the city's contention that the specific nature of its liens, as against the general nature of the Government's, gave it priority even for liens attaching *after* the federal tax assessments. The Court rejected this claim on the basis that "the priority of each statutory lien contested here must depend on the time it attached to the property in question and become choate," 347 U.S. at 86, and that the prior federal tax liens, although general, were "choate" as soon as they attached. It would seem that if the general federal tax lien under §§ 6321 and 6322 is thus sufficiently "choate" to prevail over a later specific local tax lien, a general state tax lien under an almost identically worded statute must also be "choate" enough to prime a later and equally general federal tax lien under Chief Justice Marshall's "cardinal rule" of "first in time, first in right", in the absence of contrary direction by Congress. So Judge Parker said in dictum in *United States* v. *Greenville*, 118 F. 2d 963, 966 (4 Cir. 1941), a case cited with apparent approval in *New Britain*, 347 U.S. at 84.

The Government also presses upon us post-*New Britain* decisions of the Supreme Court under the tax lien statutes. Of these, only *United States* v. *Buffalo Savings Bank*, 371 U.S. 228 (1963), concerns rival liens arising from tax assessments of a state or municipality, and it adds nothing relevant to the instant case, since the local liens there, like the city liens held junior in *New Britain*, attached subsequent to the assessment of the federal taxes. *United States* v. *Acri*, 348 U.S. 211 (1955) (attachment lien prior to judgment), and *United States* v. *Liverpool &*

London Ins. Co., 348 U.S. 215 (1955) (garnishment lien prior to judgment), were similar to *Security Trust* and are distinguishable from the instant case on the same basis that it is. In *United States* v. *Scovil*, 348 U.S. 218 (1955), the federal taxes were assessed and had become liens before the landlord's distress warrant issued; only the notice of the federal liens postdated the warrant, and the Court held that the lien created by such a warrant was not a mortgage, pledge, judgment or purchase under § 3672 of the 1939 Code, corresponding to § 6323 of the 1954 Code. See notes 3 and 7, *supra*. In *United States* v. *R. F. Ball Construction Co.*, 355 U.S. 587 (1958), decided *per curiam* by a 5–4 vote, the subcontractor's surety whose claim to priority was denied had rested its case on its alleged status as a mortgagee under § 3672 of the 1939 Code. This was also the claim espoused by the four dissenting Justices, who referred to § 3672 as "the statute here conceded by the parties to be controlling." 355 U.S. at 589–90. We see no reason to suppose that the case stands for anything more than a denial of this claim. But if it were to be read as having also decided that, apart from § 3672, the surety enjoyed no priority on the basis of "first in time, first in right" because its lien was not "choate," or if such a view is thought to have been a factor in the Court's decision that the surety's interest did not come within § 3672, the case can be distinguished here. For such a decision may well have turned on the fact that, as appears from the opinion of the District Court, 140 F. Supp. 60 (W.D. Texas), aff'd, 239 F. 2d 384 (5 Cir. 1956), and the record, the surety's claim, based on an assignment made by the subcontractor in consideration for a performance bond covering a construction job in Texas, was for liabilities incurred on the subcontractor's behalf in connection with a completely different job in Louisville, Kentucky; the bond for

this other job was not executed until nearly nine months after the assignment of funds to become due to the subcontractor on the Texas job, and the liabilities for which the surety was seeking to recover out of these funds had not yet arisen at the time the federal tax liens arose. See 4 Corbin, Contracts (1962 pocket part), at 147, n. 72; *United States* v. *L. R. Foy Construction Co.*, 300 F. 2d 207 (10 Cir. 1962). The distinction would, indeed, be more satisfying if the federal tax assessment had preceded the making of the Louisville contract and not merely the accrual of losses thereunder, but there is nothing to indicate that the Court focused on this point.

There remain [*] a series of mechanics' lien cases, all upholding priority of the federal tax lien and all decided by *per curiam* reversal on petition for certiorari: *United States* v. *Colotta,* 350 U.S. 808 (1955); *United States* v. *White Bear Brewing Co.,* 350 U.S. 1010 (1956); *United States* v. *Vorreiter,* 355 U.S. 15 (1957); and *United States* v. *Hulley,* 358 U.S. 66 (1958). See also *United States* v. *Kings County Iron Works, Inc.,* 224 F. 2d 232 (2 Cir. 1955). The *Vorreiter* case occasions no difficulty since, as appears from the report in 134 Col. 543, 307 P. 2d 475, 476 (1957), the federal tax lien arose, though it was not yet recorded, before the contracts giving rise to the mechanics' liens were made. Neither does the *Hulley* case since, as appears from the Government's petition for certiorari (in which is printed the unreported opinion of the Florida Circuit Court for Pinellas County), the United States tax assessment lists had been received by the District Director, and the federal

[*] We are aware also of *Aguilino* v. *United States*, 363 U.S. 509 (1960); *United States* v. *Durham Lumber Co.*, 363 U.S. 522 (1960); and *Crest Finance Co.* v. *United States*, 368 U.S. 347 (1961), but do not consider them relevant here.

tax liens had thus attached, on December 2, 1952 and January 7, 1954, long before the beginning of the construction work on March 11, 1955. In *Colotta,* the work had been completed before the federal assessment, 224 Miss. 33, 79 So. 2d 474, 475 (1955), but the decision, made on the Government's unopposed petition for certiorari over the dissent of Mr. Justice Douglas, may have turned on the fact that the holders of the mechanics' liens had neither recorded their contracts under § 359 nor filed the *lis pendens* notice provided for by § 380 of the Mississippi Code before the federal lien arose, nor had they taken any steps to enforce their liens by bringing suit and obtaining judgment. In *White Bear,* which drew a dissenting opinion from Mr. Justice Douglas joined by Mr. Justice Harlan, the mechanics' lien, although recorded, likewise had not been reduced to judgment when the federal taxes were assessed. See 227 F. 2d at 361.

Apparently, as suggested by Judge Haynsworth, dissenting in *United States* v. *Bond,* 279 F. 2d 837, 849 (4 Cir.), cert. denied, 364 U.S. 895 (1950),[9] the Supreme Court views a mechanic's lien, even if "duly filed and recorded and presently in the process of being foreclosed," as simply "an interim step in the lienor's progress toward the status of a judgment creditor and the foreclosure of all possible defenses to his claim," and thus as analogous to "the lien product of provisional remedies," such as those in *Security Trust, Acri, and Liverpool & London.* See Mr. Jus-

[9] The actual decision in that case is not relevant to our problem; it held that the portion of *New Britain* upholding the priority of federal tax assessments over subsequently accruing local tax liens was not rendered inapplicable because the taxes were paid by a mortgagee whose mortgage, having priority over the federal taxes by virtue of § 6323 of the Internal Revenue Code (former § 3672), covered such taxes. *Accord, United States* v. *Buffalo Savings Bank, supra,* 371 U.S. 228.

tice Douglas' dissent in *White Bear,* 350 U.S. at 1011. Whether or not this is the right explanation of *Colotta* and *White Bear,* and whether or not we might agree with Judge Haynsworth as to the equity of the doctrine in cases where the federal tax assessment, or even the notice thereof, postdates the construction work, see 279 F. 2d at 849 n. 8, we do not regard those decisions as controlling the case of a lien arising from a state or local tax assessment. Although such an assessment does not make the taxing body a "judgment creditor" within § 6323 of the Code, *United States* v. *Gilbert Associates, Inc.,* 345 U.S. 361 (1953), see note 7 *supra,* it goes considerably further along that road than a mechanic's lien, which arises out of a private contractual arrangement and to which the taxpayer may have all sorts of defenses. At least this is true, where, as here, the state or local government is no more required than is the United States to resort to the courts to enforce its due. See note 2 *supra.* As the Supreme Court said in *Bull* v. *United States,* 295 U.S. 247, 260 (1935), "The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt." This distinction seems to us the only way to reconcile the *Colotta* and particularly the *White Bear per curiams,* subordinating a mechanic's lien, earlier and on specific property, to the lien of a federal tax assessment later and general, with the *New Britain* opinion which prefers a local tax lien on specific property to a later general federal tax lien but prefers the latter to a subse-

quent specific local tax lien.[10] Doubtless we shall soon be instructed if we are wrong.[11]

Affirmed.

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[10] A possible argument against reconciliation on this basis is that although New Britain's lien for real estate taxes could be enforced by levy and sale, 1949 Conn. Gen. Stats. § 1853 (1960 C.G.S. § 12–172), its lien for water rents could be enforced only by judical foreclosure. 1949 Conn. Gen. Stats. §§ 758, 1863 (1960 C.G.S. §§ 7–239, 12–181). But the Government's Brief before the Supreme Court took no note of this distinction and, on the contrary, stated that both types of liens could be enforced summarily. P. 9 n. 2, p. 27 n. 13. Although a reference in the Reply Brief indicates that the Government may have become aware of the distinction, p. 5 n. 2, this hardly sufficed to disabuse the Court of the earlier concession (Brief, p. 27 n. 13) that both liens "may be enforced by levy and sale." See also Reply Brief, pp. 12–13.

[11] We recognize that in certain of the post-*New Britain* decisions under the tax lien statutes the Supreme Court has, for one purpose or another, cited cases under R.S. § 3466. See *United States* v. *Acri*, 348 U.S. at 213; *United States* v. *Scovil*, 348 U.S. at 220. But we would think it wrong to take such citations as overcoming the considered statement in *New Britain* as to the distinction between the two statutes.

United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of May one thousand nine hundred and sixty-three.

Present: Hon. LEONARD P. MOORE, Hon. HENRY J. FRIENDLY, Hon. PAUL R. HAYS, *Circuit Judges*.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

CUTTING & TRIMMING, INC., CHITTENDEN TRUST COMPANY OF BURLINGTON, ET AL., DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO, *Clerk*.

United States Court of Appeals, Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of July, one thousand nine hundred and sixty-three.

Present: Hon. LEONARD P. MOORE, Hon. HENRY J. FRIENDLY, Hon. PAUL R. HAYS, *Circuit Judges.*

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

CUTTING & TRIMMING, INC., CHITTENDEN TRUST COMPANY OF BURLINGTON, ET AL., DEFENDANTS-APPELLEES

A motion having been made herein by counsel for the appellant for leave to file the petition for rehearing out of time,

Upon consideration thereof, it is ordered that the said motion be and it hereby is granted.

A. DANIEL FUSARO, *Clerk.*

By VINCENT A. CARLIN, *Chief Deputy Clerk.*

United States Court of Appeals, Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of July, one thousand nine hundred and sixty-three.

Present: Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. Paul R. Hays, *Circuit Judges.*

United States of America, plaintiff-appellant

v.

Cutting & Trimming, Inc., Chittenden Trust Company of Burlington, et al., defendants-appellees

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A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is ordered that said petition be and hereby is denied.

A. Daniel Fusaro, *Clerk.*

By Vincent A. Carlin, *Chief Deputy Clerk.*

APPENDIX B

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1958 ed., Sec. 6321.)

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1958 ed., Sec. 6322.)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

* * * * *

(26 U.S.C. 1958 ed., Sec. 6323.)

8 Vermont Statutes Annotated (1958 Rev.) Title 32:

SEC. 5765. AMOUNT OF WITHHELD TAXES AS LIEN AGAINST EMPLOYER.

If any employer required to deduct and withhold a tax under section 5761 of this title neglects or refuses to pay the same after demand, the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such employer. Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable. Such lien shall be valid as against any subsequent mortgagee, pledgee, purchaser or judgment creditor when notice of such lien and the sum due has been filed by the commissioner of taxes with the clerk of the town or city in which the property subject to the lien is situated, or, in the case of an unorganized town, gore or grant, in the office of the clerk of the county wherein such property is situated. * * *

SEC. 5767. FORECLOSURE OF LIEN.

The lien provided for by section 5765 of this title may be foreclosed in the case of real estate agreeably with the provisions of law relating to foreclosure of mortgages on real estate, and in the case of personal property, agreeably with the provisions of law relating to the foreclosure of chattel mortgages.

U. S. GOVERNMENT PRINTING OFFICE: 1963

INDEX

CITATIONS

IN THE

Supreme Court of the United States

October Term, 1963

No. 509

United States of America

v.

The State of Vermont; Cutting & Trimming, Inc.; Chittenden Trust Company of Burlington; Rainbow Children's Dress Company of New York

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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ANSWER OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the District Court is reported at 206 Fed. Supp. 951. The opinion of the United States Court of Appeals for the Second Circuit is set forth in Appendix A to the Petition for a Writ of Certiorari and is reported at 317 F. 2d 446.

Questions Presented

1. Whether the rule that federal law governs the question of the relative priority of a federal tax lien and a competing state statutory lien is constitutionally correct in view of the cases holding that there is no federal common law.

2. Whether, if the rule that federal law governs the relative priority of a federal tax lien and a competing state created lien is still followed, the rules of choateness as developed in insolvency cases are applicable to a solvency case where a state lien is identical to the federal lien and prior thereto at every step in the proceedings.

Statutes and Constitutional Provisions Involved

The statutes involved are 26 U. S. C. A. 6321, 6322, 6323 and 32 Vermont Statutes Annotated 5765, and are set forth in Petitioner's Appendix B. Constitutional provisions involved are Amendment V and Amendment X of the Constitution of the United States, and are set forth in Respondent's Appendix B.

Statement

On October 21, 1958, the defendant, Cutting & Trimming, Inc., filed a withholding tax return with the Vermont Tax Department reporting that it had withheld from the wages of its employees for the third quarter, 1958, State income taxes in the amount of $1,628.15. This sum was not paid to the Tax Department. (Tr. 43, Appendix A.*) Thereafter on the same date, the commissioner of taxes for Vermont made an assessment and demand on Cutting & Trimming, Inc., in the amount of $1,628.15. On October 30, 1958, a notice of tax lien was filed in the Burlington city clerk's office for the unpaid taxes. On May 21, 1959, the State of Vermont brought suit to enforce its lien against Cutting & Trimming, Inc., the Chittenden Trust Company being joined as trustee. The trustee filed a disclosure showing it held One Thousand Two Hundred Seventy-eight Dollars and Eighty-two Cents ($1,278.82) as trustee of Cutting & Trimming, Inc.

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* Also Appendix to Appellant's Brief to Court of Appeals, p. 43, Motion to Amend Answer.

On October 23, 1959, judgment was entered by Chittenden County Court for the State of Vermont against Cutting & Trimming in the amount of $4,049.22, and against the defendant, Chittenden Trust Company, in the amount of $1,278.82. The suit was brought to enforce other tax liens held by the State of Vermont against Cutting & Trimming, as well as the tax lien which arose October 21, 1958. (At issue here is only the October 21 lien for only as to this lien does the State claim priority.) Petitioner's Appendix A, p. 15-16.

On February 6, 1959, the Commissioner of Internal Revenue made assessments for outstanding federal taxes in the amount of $5,365.96. A notice of lien was filed on or about June 2, 1959, in the office of the city clerk, Burlington, Vermont.

In 1961 the United States brought suit in the United States District Court, not only to enforce the lien claimed in this case, but for other amounts claimed due but not pertinent to the issue here. A judgment order was rendered by the District Court finding that the State of Vermont was entitled to priority up to the amount of its lien of $1,628.15, plus interest. Final judgment was entered, and the United States appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals affirmed the judgment of the District Court on May 9, 1963. Petitioner's Appendix A, p. 16. The Court of Appeals held that under *United States* v. *City of New Britain*, 347 U. S. 81, the same tests of choateness which had been formulated by the courts in insolvency cases did not apply to cases where no insolvency was involved. It held that since the Vermont statute created a lien which was identical to the federal lien, and which was, under the *New Britain* case, as general or specific as the federal lien, the same standards applied and that the cardinal principle of first in time, first in right, was applicable. Thus, the Vermont tax lien had priority over the federal lien. Petitioner's Appendix A, 16-30.

Argument

1. The rule that it is a matter of federal law as to when a lien created by state law "has acquired sufficient substance" . . . "as to defeat a later arising federal tax lien" should no longer be followed.

The Court has heretofore taken the view that the question of the relative priority of a federal tax lien and a competing statutory lien is governed by federal law. *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47; *United States* v. *City of New Britain*, 347 U. S. 81; *United States* v. *Pioneer American Insurance Co.*, 374 U. S. 84. The rule developed in the early cases, and apparently has not been challenged before this Court in recent years. The Court has paid heed to state law under some circumstances.

> "Yet because federal liens intrude upon relationships traditionally governed by state law, it is inevitable that the Court in developing the federal law defining the incidents of such liens, should often be called upon to determine whether, as a matter of federal policy, local policy should be adopted as the governing federal law, or whether a uniform nationwide federal rule should be formulated."
>
> *United States* v. *Brosnan*, 363 U. S. 237, 240.

In *Brosnan* the Court adopted, as federal law, state law "governing the divestiture of federal tax liens." *Supra*, p. 241. Earlier the Court applied state law in determining the extent of the "property and rights to property" to which a government tax lien attaches. *United States* v. *Bess*, 357 U. S. 51, 55.

In asserting that the question of the priority of a federal tax lien is a federal question and in developing certain rules relating thereto, the Court has apparently taken the view that there is some federal common law governing priorities, for the federal tax lien statute is silent on the matter. There is no indication in the federal statutes that a state created lien must be choate or perfected in some way to prevail over a federal tax lien. Such a rule would seem to be no longer applicable in view of the cases which have held that there is no federal common law. *Erie Railroad Co.* v. *Tompkins*, 364 U. S. 64; *Wheelden* v. *Wheeler*, 373

U. S. 647. Also see *United States* v. *Certain Property, etc.*, 306 F. 2d 439. In other words, the federal courts should apply state law in determining when a state created lien becomes effective. To permit a federal tax lien to gain priority over an earlier arising state lien because of supposed federal common law rules as to when the state lien takes effect is to ignore the Tenth Amendment to the United States Constitution. The Constitution has not delegated to the Federal Government the right to determine the effectiveness of liens created by state law, nor has the Constitution or Congress given the Federal Courts the right to make such a determination and, thus, decide on the validity of property interests arising thereunder. Furthermore, to give a junior federal tax lien priority over many state liens, such as mechanics' liens, because of federal rules of choateness in conflict with state laws as to when a state lien arises, is to take property without due process and in violation of the Fifth Amendment to the Constitution of the United States. Significant in this connection are:

> *Chicago Federal Savings & Loan Assn.* v. *Cacciatore*, 25 Ill. 2d 535, 185 N. E. 2d 670;
> *Milton Savings Bank* v. *United States*, 187 N. E. 2d 379.

2. A state tax lien which is identical to the federal tax lien and which arises earlier has priority.

Even if the priority of the federal tax lien is still considered a federal question, the Court of Appeals was correct in upholding the priority of the Vermont tax lien under the facts of this case.

The Vermont tax lien is identical to the federal tax lien as to the time it arises, its duration, the property to which it attaches and the method of enforcement. The State's lien arises "at the time assessment and demand is made by the commissioner of taxes and shall continue until liability of such sum, with interest and costs, is satisfied, or becomes unenforceable." 32 V. S. A. 5765. The lien of the United States arises "at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time." 26 U. S. C. A. 6322. The liens are "upon all the property and rights to property, whether real or personal" belonging to

the taxpayer. 32 V. S. A. 5765; 26 U. S. C. A. 6321. Court action was brought by both the United States and the State of Vermont to enforce their respective liens. Petitioner's Appendix A. It can readily be seen, then, that one lien is as specific or general as the other.

Vermont was ahead of the United States at every step in the proceedings. Assessment and demand was made first, a tax lien was filed first and suit was brought first to enforce the lien which arose at the time of assessment and demand. Petitioner's Appendix A. The federal statutes being silent as to the relative priority of a federal tax lien and a competing state created lien, the general rule of "first in time, first in right", applies. *United States* v. *New Britain, supra.*

This case is distinguishable from the many cases where the Court has upheld the priority of the federal tax lien as against various competing interests. No case has been decided by the Court which is directly in point. In many of the cases, the amount of the competing lien was uncertain at the time the federal lien arose. *United States* v. *Texas,* 314 U. S. 480; *United States* v. *Acri,* 348 U. S. 211, and others. Distinguishable also are the garnishment cases (*United States* v. *Liverpool & London Insurance Co.,* 348 U. S. 215), the attachment cases (*United States* v. *Security Trust & Savings Bank, supra*) and the mechanics' lien cases (*United States* v. *White Bear Brewing Co.,* 350 U. S. 1010).

In all of these cases "numerous contingencies might arise that would prevent the lien from ever becoming perfected by a judgment awarded and recorded." *United States* v. *Security Trust & Savings Bank, supra.*

The same reasons do not hold true here where assessment and demand was made based on admitted liability of the taxpayer. Respondent's Appendix A.

In cases arising under 31 U. S. C. A. 191, involving insolvency, the Court has prescribed certain tests of choateness. *Illinois* v. *Campbell,* 329 U. S. 362. The priority of the United States is clearly set forth by statute in such cases.

> "Whenever any person indebted to the United States is insolvent . . . the debts due the United States shall be first satisfied." 31 U. S. C. A. §191.

In *Illinois* v. *Campbell, supra,* p. 375, the Court said that in order to prevail over a federal lien arising under Section 191, a competing lien must be choate or perfected in the sense that (1) the identity of the lienor, (2) the property subject to the lien and (3) the amount of the lien are established. Since Section 191, by its terms, confers priority upon the lien of the United States, it is readily apparent why the strict test of choateness was developed. There is no reason to apply such tests to non-insolvency cases where the statutes are silent as to priority.

Unfortunately the Court has referred to the choateness test in other cases, such as *United States* v. *Pioneer American Insurance Company, supra,* when it was not necessary to a decision in the case. However, the Court clearly recognized that insolvency and non-insolvency cases should be treated differently and said so in *United States* v. *New Britain, supra.* It is interesting to note that the Court has never yet upheld the priority of a competing lienor in insolvency cases; yet it has in cases where no insolvency was involved. *United States* v. *New Britain, supra.*

Since we have two identical competing tax liens and with the State of Vermont and the United States equally in need of means of enforcing the collection of tax revenues, there is no reason in law or equity why the same principles should not be applied to both. To hold otherwise is to impose an unjustifiable double standard contrary to the long established rule of lien priority "first in time, first in right."

Conclusion

Despite the aforegoing, the State recognizes that an important question is at issue with no decision of this Court directly in point and agrees that a writ of certiorari should be granted.

Respectfully submitted,

Charles E. Gibson, Jr.,
Attorney General,
State Library Building,
Montpelier, Vermont.

APPENDIX A

[Tr. 43]

[Caption omitted]

Motion For Leave To Amend Answer

[Filed March 8, 1962]

Now comes the State of Vermont, a defendant in the above-entitled cause, by its Deputy Attorney General Charles E. Gibson, Jr., and respectfully moves for leave of the Court to amend the Answer by adding at the end of paragraph 13 the following language:

"That the aforesaid assessments were made on the basis of a quarterly withholding tax return filed on October 21, 1958, by the defendant, Cutting & Trimming, Inc., with the Vermont Tax Department, said return reporting that the amount of $1,628.15 was withheld by Cutting & Trimming, Inc., from the wages of its employees for the third quarter 1958 and a withholding tax return filed on February 7, 1959, by the defendant, Cutting & Trimming, Inc., had withheld from the wages of its employees for the fourth quarter 1958 the amount of $964.08. The defendant, Cutting & Trimming, Inc., failed to pay the amounts for which it was liable to the State of Vermont as set forth in its withholding returns aforesaid, assessments and demands were made as indicated heretofore and suit was brought by the State of Vermont to enforce its tax liens."

The ground for this motion is that the additional language was omitted in the Answer and is relevant, material and essential in order for there to be a fair adjudication of this case.

State of Vermont,
by Charles E. Gibson, Jr.,
Charles E. Gibson, Jr.,
Deputy Attorney General.

March 7, 1962.

(Same as Appendix to Appellant's Brief to the United States Court of Appeals, p. 43.)

APPENDIX B

United States Constitution.

Amendment V. [Criminal indictment; double jeopardy; self incrimination; due process; compensation for taking private property.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment X. [Powers reserved to the states.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 509

UNITED STATES OF AMERICA, PETITIONER

v.

VERMONT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 19–27) is reported at 206 F. Supp. 951. The opinion of the court of appeals (R. 29–43) is reported at 317 F. 2d 446.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1963 (R. 44). On July 3, 1963, the court of appeals (1) granted a motion of the United States for leave to file a petition for rehearing out of time (R. 44–45), and (2) denied the petition (R. 46–57, 58). The petition for a writ of certiorari was filed on September 30, 1963, and was granted on December 9, 1963 (R. 58; 375 U.S. 940). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a general tax lien of the State of Vermont upon all of a taxpayer's property, which arises upon assessment of the tax but does not attach to specific property, is subordinate to a subsequently-arising federal tax lien.

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 and the Vermont Statutes Annotated are set forth in the Appendix, *infra*, pp. 23–25.

STATEMENT

On October 21, 1958, the State of Vermont made an assessment and demand on Cutting & Trimming, Inc. for state income taxes of $1,628.15 which the company had withheld from wages paid to its employees (R. 17, 30).[1] The pertinent Vermont statute (32 V.S.A. Section 5765, App., *infra*, p. 24) provides that if an employer who is required to deduct and withhold a tax from an employee's wages fails to pay the same after demand, "the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such employer," and further that "Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable."

[1] On October 30, 1958, it filed with the City Clerk of Burlington a notice of lien for such taxes (R. 17, 30).

On May 21, 1959, the State instituted suit in a state court against Cutting & Trimming and Chittenden Trust Company, a Vermont bank in which Cutting & Trimming had $1,878.82 on deposit, of which $600 had already been attached by Rainbow Children's Dress Company (R. 10–11, 30–31). On October 23, 1959, the State court entered judgment for Vermont against Cutting & Trimming for $4,049.22 (which included other tax assessments not here relevant), and against Chittenden Trust Company for $1,278.82 (R. 11, 31).

Prior to the filing of the State court suit—but subsequent to the State's assessment and demand—the Commissioner of Internal Revenue on February 6, 1959, made an assessment of $5,365.96 against Cutting & Trimming for 1958 taxes under the Federal Unemployment Tax Act (R. 6, 31).[2] In 1961, the United States brought the present action against Cutting & Trimming, the State of Vermont, and others, to establish Cutting & Trimming's tax liability, and to foreclose its tax lien against the property of Cutting & Trimming held by the trust company (R. 5–8). The answer of the State of Vermont alleged that the October 21, 1958, assessment gave its lien priority over the federal lien (R. 8–12). On the United States' motion for judgment on the pleadings (R. 14–16), the district court held that the State of Vermont's tax lien had priority over the federal lien, and directed the trust company to apply the $1,878.82 first to the

[2] On June 2, 1959, the Commissioner served a notice of lien and levy upon Chittenden Trust Company (R. 13). Shortly before, on May 25, 1959, the State of Vermont had served a writ of attachment on the bank (*ibid.*).

payment of principal and interest on the State's tax lien, and to pay any balance to the United States (R. 19-27).

The court of appeals affirmed (R. 44). The court ruled that under the standards which this Court has applied for determining the relative priority of federal claims and State tax liens under Section 3466 of the Revised Statutes (now 31 U.S.C. 191) where the taxpayer is insolvent, the general lien of the State of Vermont upon all the taxpayer's property was not sufficiently perfected to prevail over the federal tax claim (R. 33); that a different standard for determining whether the State lien is perfected applies, however, when the federal priority is asserted under the lien provisions of the Internal Revenue Code against a non-insolvent taxpayer (R. 33-43); and that under this Court's decision in *United States* v. *New Britain*, 347 U.S. 81, "[i]t would seem that if the general federal tax lien under §§ 6321 and 6322 is thus sufficiently 'choate' to prevail over a later specific local tax lien, a general state tax lien under an almost identically worded statute must also be 'choate' enough to prime a later and equally general federal tax lien under Chief Justice Marshall's 'cardinal rule' of 'first in time, first in right', in the absence of contrary direction by Congress" (R. 39).

SUMMARY OF ARGUMENT

I

This Court should follow the settled principle that federal rather than State law controls in determining when a State tax lien "has become so perfected as

to defeat a later-arising or later-filed federal tax lien" (*United States* v. *Pioneer American Insurance Co.*, 374 U.S. 84, 88). Since the federal lien is created and defined by a federal statute, and since its scope and effectiveness directly affect the revenues that the federal government can collect, it is federal law which determines its incidents.

II

A. This Court has repeatedly and consistently held that State-created liens do not have priority over a subsequently accruing federal tax lien unless, at the time the latter arose, the State lien was already perfected or choate. A State lien is not choate as against a federal tax lien unless "[1] the identity of the lienor, [2] the property subject to the lien, and [3] the amount of the lien are established." *United States* v. *New Britain*, 347 U.S. 81, 84, quoted with approval in *United States* v. *Pioneer American Insurance Co.*, 374 U.S. 84, 89. The second requirement for choateness—the establishment of "the property subject to the lien"—requires that "[t]he lien must attach to specific property of the debtor" (*Illinois* v. *Campbell*, 329 U.S. 362, 373). Under these principles, the Vermont lien was not choate when the federal lien attached. Although the State lien had come into being when the State assessed and demanded the tax—which was prior to the federal lien—the State's lien was not then perfected because it had not attached to specific property of Cutting and Trimming but was only a general lien upon all of that company's property.

B. The foregoing principles are equally applicable when the federal priority rests upon the lien provisions of the Internal Revenue Code rather than upon the federal insolvency statute (Section 3466 of the Revised Statutes), under which this Court developed the choateness test for State liens. In the five cases in which the test was developed, the Court held that, although a State tax lien on all of a taxpayer's property was valid against other State-created interests, it was not sufficiently perfected to defeat the priority which Section 3466 gave to the federal government in insolvency. The basic purpose of the priority under Section 3466—"to secure an adequate revenue to sustain the public burdens, and discharge the public debts" (*United States* v. *State Bank of North Carolina,* 6 Pet. 29, 35)—also underlies and explains the lien system which Congress has provided for the collection of federal taxes, and the same standards of choateness should prevail under both provisions. This Court unanimously so held in *United States* v. *Security Trust & Savings Bank,* 340 U.S. 47, 51, on the ground that the choateness test was necessary in determining priority between State liens and federal tax liens "if the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled." In *United States* v. *New Britain,* 347 U.S. 81, 86, the Court reaffirmed its holding in *Security Trust* that the choateness principle applies in determining the relative priority of federal tax liens and State-created liens, and also made it clear that a local tax lien is not sufficiently perfected to defeat a federal lien un-

less, at the time the latter arose, the State lien had already become choate in the sense that it was "certain as to amount, identity of the lienor [and] the property subject thereto." The seeming anomaly that a federal tax lien is perfected even though it is a general lien but that a similar State tax lien is unperfected because it has not attached to specific property, merely reflects the priority which the federal lien has been given in order to protect the federal revenue.

ARGUMENT

The issue in this case is whether a general tax lien of the State of Vermont upon all of a taxpayer's property, which arises upon assessment of the tax, is subordinate to a subsequently-arising federal tax lien because, when the federal lien arose, the State lien was not perfected or choate since it had not attached to specific property.

As this Court frequently has held, and repeated only last Term in *United States* v. *Pioneer American Insurance Co.*, 374 U.S. 84, 88, "it is a matter of federal law when such a lien has acquired sufficient substance and has become so perfected as to defeat a later-arising or later-filed federal tax lien." Respondent State of Vermont urges (Answer to Pet. for Cert., pp. 4-5), however, that this rule should no longer be followed, and that State rather than federal law should henceforth control the determination whether a State-created lien is sufficiently perfected to prevail over a federal tax lien. We shall show, *first*, that the rule making federal law controlling in this field is correct and should be followed, and, *second*, that under

the controlling federal principles the federal tax lien in this case primes the State's lien.

I

FEDERAL LAW PROPERLY GOVERNS THE DETERMINATION WHETHER A STATE-CREATED LIEN HAS BEEN SUFFICIENTLY PERFECTED TO DEFEAT A FEDERAL TAX LIEN

The federal tax lien is created and defined by a federal statute which Congress passed in the exercise of its constitutional power to lay and collect taxes. Its scope and effectiveness directly affect the amount of revenue that the federal government can collect. Under well settled principles, therefore, federal rather than State law determines its incidents. See, *e.g.*, *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366–367; *United States* v. *Allegheny County*, 322 U.S. 174, 182–183. "The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question" (*United States* v. *Security Trust & Savings Bank*, 340 U.S. 47, 49). "Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined" (*United States* v. *New Britain*, 347 U.S. 81, 86, quoted with approval in *Pioneer American, supra,* at 88–89).

The State relies on *United States* v. *Brosnan*, 363 U.S. 237, 241, where this Court, in determining whether concededly junior federal tax liens had been divested from specific property by state mortgage foreclosure procedures, "adopt[ed] as federal law state law." In so doing, however, the Court expressly

pointed out (p. 240) that since "Federal tax liens are wholly creatures of federal statute" which provides "[d]etailed provisions govern[ing] their creation, continuance, validity, and release * * * matters directly affecting the nature or operation of such liens are federal questions, regardless of whether the federal statutory scheme specifically deals with them or not." The Court, however, declined to adopt an independent federal standard governing divestiture of junior federal tax liens because it would "inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or superimposing on them a new federal rule" (p. 242).

The considerations which led the Court to look to state law in the *Brosnan* case are plainly inapplicable here. The issue here is not the procedure for the enforcement of federal liens, but the substantive question of their priority.[3] Applying the settled federal rule that a State-created lien does not prime a federal tax lien unless the State lien is perfected or choate when the federal lien arises would neither clash with any "competing private property interests" nor displace "well-established state procedures governing their enforcement."[4]

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[3] We read this Court's reliance on *Brosnan* in its recent decision in *Meyer* v. *United States*, 375 U.S. 233, 238-239, as reflecting its view that the application of the doctrine of marshaling of assets similarly involved a question of the enforcement of federal liens.

[4] The State of Vermont may here enforce its tax liens against specific property by the procedures provided by State statute, *i.e.*, a foreclosure suit against specific real property, a sale of personal property, or, as here, a suit against the taxpayer aided by attachment of specific property. See 8 Vermont Statutes Annotated (1959 Rev.), Title 32, Sec. 5767, App. *infra*, p. 25.

The State would remain free to define, as between itself and the property interests which it creates, the respective priority of such interests. Continued application of federal law in this field would affect only the relations between the States and the federal government—an area in which, under the Supremacy Clause of the Constitution, the federal interest is paramount.

II

THE FEDERAL TAX LIEN HAS PRIORITY OVER AN EARLIER-ARISING GENERAL STATE TAX LIEN WHICH HAS NOT ATTACHED TO SPECIFIC PROPERTY

A. UNDER THE CONTROLLING DECISIONS OF THIS COURT, THE STATE OF VERMONT'S TAX LIEN WAS NOT SUFFICIENTLY PERFECTED TO DEFEAT THE FEDERAL TAX LIEN, SINCE IT HAD NOT ATTACHED TO SPECIFIC PROPERTY WHEN THE FEDERAL LIEN AROSE

In 1950 this Court, applying the principles which it had developed in holding that a general State tax lien upon all of a taxpayer's property was not sufficiently perfected to defeat the priority which Section 3466 of the Revised Statutes (now 31 U.S.C. 191) gave in insolvency to all debts due to the United States (including taxes), ruled that a State-created lien does not have priority over a subsequent federal tax lien unless, at the time the federal tax lien accrued, the State lien was already perfected or "choate." *United States* v. *Security Trust & Savings Bank*, 340 U.S. 47. Since that decision, the Court has repeatedly and consistently denied State-created liens which did not satisfy the federal standard of perfection or choateness priority over subsequently-attaching federal tax liens.[8] Only last Term, in

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[8] *United States* v. *New Britain*, 347 U.S. 81; *United States* v. *Acri*, 348 U.S. 211; *United States* v. *Liverpool & London*

United States v. *Pioneer American Insurance Co.*, 374 U.S. 84, 88, the Court reiterated and reapplied the principle that State-created liens "take priority over later federal tax liens" only if, when the federal liens arose, the State liens were already "choate."

A State lien is not choate as against a federal tax lien, however, unless and until three conditions have been satisfied: "when [1] the identity of the lienor, [2] the property subject to the lien, and [3] the amount of the lien are established." *United States* v. *New Britain*, 347 U.S. 81, 84, quoted with approval in *Pioneer, supra*, at 89. The second requirement for choateness—the establishment of "the property subject to the lien"—requires that "[t]he lien must attach to specific property of the debtor." *Illinois* v. *Campbell*, 329 U.S. 362, 373. In the *Campbell* case a State tax lien upon all of a taxpayer's property was held to be "not so specific and perfected as to defeat the priority of [the tax claim of] the United States" under Section 3466 of the Revised Statutes, even though the State had already secured the appointment of a receiver of the insolvent taxpayer's property at the time the federal lien attached.

There can be no doubt that, under the foregoing principles, the Vermont lien was not choate when

Ins. Co., 348 U.S. 215; *United States* v. *Scovil*, 348 U.S. 218; *United States* v. *Colotta*, 350 U.S. 808, reversing *per curiam*, 224 Miss. 33, 79 So. 2d 474; *United States* v. *White Bear Brewing Co.*, 350 U.S. 1010, reversing *per curiam*, 227 F. 2d 359 (C.A. 7); *United States* v. *Vorreiter*, 355 U.S. 15, reversing *per curiam*, 134 Colo. 543, 307 P. 2d 475; *United States* v. *Ball Construction Co.*, 355 U.S. 587, reversing *per curiam*, 239 F. 2d 384 (C.A. 5); *United States* v. *Hulley*, 358 U.S. 66, reversing *per curiam*, 102 So. 2d 599 (Fla.); *Crest Finance Co.* v. *United States*, 368 U.S. 347; *United States* v. *Buffalo Sav. Bank*, 371 U.S. 228.

the federal lien attached. While the Vermont lien came into being when the State assessed and demanded the tax—which was prior to the federal tax lien [6]—the State's lien was not then perfected because it had not attached to specific property of Cutting & Trimming, but was only a general lien upon all of that company's property. Although the State of Vermont subsequently took steps to perfect its lien by attaching the bank account in question, such suit was not instituted until after the federal tax lien had arisen and had been recorded. Thus, when the federal lien arose, the State lien did not meet one of the three essential elements of a choate lien: that it attach to specific property.

B. THE PRINCIPLES WHICH THIS COURT HAS APPLIED UNDER THE FEDERAL INSOLVENCY STATUTE FOR DETERMINING WHETHER A STATE-CREATED LIEN IS PERFECTED OR CHOATE ARE EQUALLY APPLICABLE WHEN THE FEDERAL PRIORITY IS ASSERTED UNDER THE LIEN PROVISIONS OF THE INTERNAL REVENUE CODE

The court of appeals, although recognizing that the State of Vermont's general lien upon all of the taxpayer's property was not sufficiently perfected to defeat the federal lien under the federal insolvency statute (R. 33), concluded that a different rule applies when the federal priority is asserted under the lien provisions of the Internal Revenue Code. It reasoned that if, as *United States* v. *New Britain*, 347 U.S. 81, 84, teaches, the federal lien upon all of a taxpayer's property is "perfected in the sense that there is nothing more to be done to have a choate lien," a

[6] The State's assessment and demand was made on October 21, 1958 (R. 30); the federal lien arose on February 6, 1959, when the federal taxes were assessed (R. 6, 31). Sections 6321 and 6322, Internal Revenue Code of 1954, App., *infra*, p. 23.

State lien upon all of a taxpayer's property is similarly perfected.[7] This conclusion fails to give appropriate weight to the underlying rationale of the decisions of this Court in which the choateness test was developed, and to the basic Congressional policy of protecting federal revenues which that doctrine is designed to implement.

In the first case under the insolvency statute in which the choateness doctrine was applied [8](*Spokane County* v. *United States*, 279 U.S. 80), the question was whether State taxes assessed against an insolvent prior to the appointment of a receiver, and which under State law constituted a lien upon all the taxpayer's property, had priority over taxes due to the United States, but not yet assessed. The State contended that the priority which Section 3466 gave to debts due to the United States did not apply as against a secured claimant (see 279 U.S. at 81). The Court found it unnecessary to decide this question, however. It ruled that since the State had not taken the necessary statutory steps to perfect its assessment lien (*i.e.*, "seizure, distraint or other specific proceedings," 279

[7] The decision below is in accord with that of the only other federal appellate court that has decided the question. *United States* v. *Bradley*, 321 F. 2d 224 (C.A. 5). It is in conflict, however, with *Weitz* v. *Electrovation, Inc.*, 48 Wash. 2d 604, 295 P. 2d 728. There the Supreme Court of Washington held that the State's tax and other liens, which attached to all of the taxpayer's property upon assessment, but which the State had not enforced "by distraint or levy of execution" (48 Wash. 2d at 609, 295 P. 2d at 731), had not "become specific and perfected prior to the effective date of the Federal liens" (48 Wash. 2d at 610, 295 P. 2d at 732) so as to defeat the latter.

[8] The doctrine was perhaps foreshadowed by Mr. Justice Story's questioning in *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 441, whether the federal insolvency priority would divest "a specific lien attached to a thing."

U.S. at 93-94), its claim could not prevail over the priority which Section 3466 gave to the unsecured federal tax claims. The Court quoted with approval the following statement of the concurring judge in the state court: "[N]either the United States, the state of Washington nor Spokane County for the state of Washington has ever, by the prescribed statutory procedure, perfected its inchoate tax lien right against any of the property of which the funds here in question are the proceeds" (279 U.S. at 94).

Four years later, in *New York* v. *Maclay*, 288 U.S. 290, the Court again found it unnecessary to decide whether "a perfected lien upon the property of the insolvent at the date of the receivership" would have priority under Section 3466 over a federal claim for taxes, since it again held that a State's tax liens upon all property of the taxpayer were "not so perfected or specific as to change the rule of distribution" (288 U.S. at 292). In *United States* v. *Texas*, 314 U.S. 480, *United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, and *Illinois* v. *Campbell*, 329 U.S. 362, the Court similarly held that liens for State or local taxes which arose upon assessment but which had not been further perfected were not sufficiently perfected to require resolution of the question whether a choate State lien would defeat the federal priority in insolvency. And, as noted above, the reason why the general local liens were held not perfected in *Campbell* was because they had not "attach[ed] to specific property of the debtor" (329 U.S. at 373).[9]

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[9] Similarly, in the *Waddill* case the Court held that until a City had taken steps to perfect its lien by distraining specific property, the lien was not "so explicit and perfected" (323

In sum, the rationale of the cases in which the choateness test was developed was that a general State or local tax lien upon all of a taxpayer's property, although valid against other State-created interests, was not valid against the claims of the Federal Government. As against such claims, which were given priority by the insolvency statute, the State lien was ineffective to give the State any position other than that of a general unsecured creditor. It is difficult to see why the result should be any different where the federal claim to priority rests upon the tax lien statute rather than upon the insolvency statute, and where the federal government is a secured rather than an unsecured creditor. Indeed, it would be most anomalous if a general State lien was viewed as not sufficiently perfected to have priority over an *unsecured* federal debt (which was the status of the tax claims involved in the solvency cases) but nevertheless was sufficiently perfected to prevail over a *secured* tax claim.

The basic purpose of the priority which Section 3466 grants in insolvency to debts due to the United States is "to secure an adequate revenue to sustain

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U.S. at 360) as to defeat the federal priority. *Waddill* also involved a landlord's lien, which the Court held was "neither specific nor perfected," since it gave him "only a general power over unspecified property rather than an actual interest in a definitive portion or portions thereof" (p. 357).

In *United States* v. *Gilbert Associates*, 345 U.S. 361, 366, the Court, following the *Campbell* and *Waddill* cases, again held that since a town's general tax lien had not "attached to certain property by reducing it to possession," the town had "only a general, unperfected lien" which did not defeat the priority of a federal tax claim under Section 3466, even though the town's general lien had arisen before notice of the federal tax was filed.

the public burdens, and discharge the public debts" (*United States* v. *State Bank of North Carolina,* 6 Pet. 29, 35, quoted with approval in *Nathanson* v. *National Labor Relations Board,* 344 U.S. 25, 28). The lien system which Congress has provided for the collection of federal taxes similarly "reveal[s] a purpose to assure the collection of [federal] taxes" (*Glass City Bank* v. *United States,* 326 U.S. 265, 267). It was, therefore, not surprising that, when this Court faced the question whether the choateness test which it had enunciated in the cases under Section 3466 was also applicable in determining priority between a State-created lien and a federal tax lien arising under the Internal Revenue Code, it unanimously held that it was. In *United States* v. *Security Trust and Savings Bank,* 340 U.S. 47, the Court held that since a creditor's attachment lien was merely "contingent or inchoate" (p. 50) because it would not be perfected until the creditor had obtained a judgment, it was junior to a federal tax lien which had arisen and been recorded subsequent to the date of the attachment lien but prior to the date the attaching creditor obtained judgment. The Court stated (340 U.S. at 51, emphasis added):

> In cases involving a kindred matter, *i.e.,* the federal priority under R.S. § 3466, it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it. *Illinois* v. *Campbell, supra,* 374. *If the purpose of the federal tax lien*

statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here. * * *

In *United States* v. *New Britain,* 347 U.S. 81, 86, the Court held that in determining the relative priority of federal tax liens and a City's lien for delinquent real estate taxes and water rent, "the priority of each statutory lien contested here must depend on the time it attached to the property in question and became choate." The competing liens in that case were on real property. The federal liens arose at various times between April 1948 and September 1950; the City's liens had "attached to the specific real estate" at various dates from 1947 through 1951. The Court, although noting that a State's characterization of a lien as "specific and perfected * * * is not, of course, conclusive against the Federal Government," accepted the holding of the Supreme Court of Errors of Connecticut that the City's liens had the requisite specificity, "since they attached to specific pieces of real property for the taxes assessed and water rent due" (p. 84). It ruled (*ibid.*) that "[t]he federal tax liens are general and * * * perfected" "in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established"; and that the City's "specific statutory liens" were similarly perfected. The Court held (p. 85), however, that it did not follow from the fact that the City's liens were perfected that they "must receive priority as a whole." On the contrary, it

ruled (pp. 86–87) that the priority of each lien depended upon when it "became choate"; and that since "certain of the City's tax and water-rent liens apparently attached to the specific property and became choate prior to the attachment of the federal tax liens," it remanded the case for determination of the respective priorities of the various liens in accordance with the principle that, as between liens of equal priority, "the first in time is the first in right" (p. 85). The Court pointed out (p. 86) that inchoate State-created liens which become "certain as to amount, identity of the lienor, or the property subject thereto only at some time subsequent to the date the federal liens attach * * * cannot then be permitted to displace such federal liens. Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined."

We submit that in *New Britain* the Court did two significant things:

1. It reaffirmed its holding in *Security Trust* that the principle of choateness applies in determining the relative priority of federal tax liens and State-created liens.

2. It made it clear that a local or State tax lien is not sufficiently perfected to defeat a federal lien unless, at the time the federal lien arose, the State lien had already become choate in the sense that it was "certain as to amount, identity of the lienor, [and] the property subject thereto."

The holding in *New Britain* that some of the City's liens had priority over the federal liens rested, we submit, on the fact that, "prior to the attachment of the federal tax liens," the City's liens "became choate" by "attach[ing] to the specific property." Contrary to the view of the court of appeals (R. 39), we do not believe that the opinion may fairly be read as indicating that since the general federal lien is perfected upon assessment of the tax (even though it has not yet then attached to specific property), a State tax lien is similarly perfected when the State tax is assessed. On the contrary, the repeated emphasis in *New Britain* on attachment to specific property as a condition for choateness of a State-created lien demonstrates that the critical factor in that case for determining when the local liens were perfected was the point at which they attached to specific property. Since, in the present case, unlike *New Britain*, the liens of the State of Vermont had not attached to specific property at the time the federal lien arose, they were not then sufficiently perfected to defeat the federal priority.

This interpretation of *New Britain* is, we believe, confirmed by *United States* v. *Pioneer American Insurance Co.*, 374 U.S. 84. For there this Court, after pointing out that under *New Britain* the priority of the federal tax lien as against State-created liens is governed by the rule of "first in time, first in right," explained that it was "critical, therefore, to determine when competing liens, whether federal- or state-created, come into existence or become valid for the purpose of the rule" (p. 87). It then stated (p. 92)

that in *New Britain* it had "denied priority to local tax liens which were imperfect when the federal tax lien was filed * * *." In other words, the rule of "first in time, first in right" comes into play only if the competing liens are both perfected, and a State-created lien is not "first in time" if, when it arose, it was not yet perfected because it did not satisfy the three requirements of a choate lien.

At first glance it might seem anomalous that, upon assessment of the tax, a federal lien upon all of a taxpayer's property is, without more, choate,[10] but a State lien in the same terms is inchoate because it has not yet attached to specific property. But this seeming anomaly reflects only the fact that, in order to accomplish "the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents" (*Security Trust, supra,* 340 U.S. at 51), the federal tax lien has been given a priority which similar State tax liens do not enjoy. In short, there is a "double standard" in this area: the federal lien is fully perfected when the tax is assessed, but State liens are not sufficiently perfected to defeat the federal lien unless and until they satisfy the three criteria of choateness which this Court has enunciated. Indeed, the existence of such a double standard was implicit in all of the decisions of this Court which, in order to protect the

[10] The federal tax lien need not be perfected by attachment to specific property, since it is fully perfected when the tax is assessed. See, in addition to *New Britain*, *United States* v. *Snyder*, 149 U.S. 210; *Michigan* v. *United States*, 317 U.S. 338; *United States* v. *Union Central Life Ins. Co.*, 368 U.S. 291; *Glass City Bank* v. *United States*, 326 U.S. 265.

federal revenue, have denied priority to earlier State-created liens which did not satisfy the federal standard of perfection.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with a direction to give the federal tax liens priority over the State tax liens.

Respectfully submitted,

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FEBRUARY 1964.

APPENDIX

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 6321.)

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 6322.)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

* * * * *

(26 U.S.C. 6323.)

Revised Statutes:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

(31 U.S.C. 191.)

8 Vermont Statutes Annotated (1959 Rev.) Title 32:

§ 5765. *Amount of withheld taxes as lien against employer*

If any employer required to deduct and withhold a tax under section 5761 of this title neglects or refuses to pay the same after demand, the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such employer. Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable. Such lien shall be valid as against any subsequent mortgagee, pledgee, purchaser or judgment creditor when notice of such lien and the sum due has been filed by the commissioner of taxes with the clerk of the town or city in which the property subject to the lien is situated, or, in the case of an unorganized town, gore or grant, in the office of the clerk

of the county wherein such property is situated. * * *

§ 5767. *Foreclosure of lien*

The lien provided for by section 5765 of this title may be foreclosed in the case of real estate agreeably with the provisions of law relating to foreclosure of mortgages on real estate, and in the case of personal property, agreeably with the provisions of law relating to the foreclosure of chattel mortgages.

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In the

Supreme Court of the United States

October Term, 1963

No. 509

UNITED STATES OF AMERICA, *Petitioner*

vs.

VERMONT, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE STATE OF VERMONT

OPINIONS BELOW

The opinion of the District Court (R. 19-27) is reported at 206 F. Supp. 951. The opinion of the Court of Appeals (R. 29-43) is reported at 317 F. 2d 446.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1963 (R. 44). On July 3, 1963, the Court of Appeals (1) granted a motion of the United States for leave to file a petition for rehearing out of time (R. 44-45), and (2) denied the petition (R. 46-57, 58). The petition for a writ of certiorari was filed on September 30, 1963, and was granted on December 9, 1963 (R. 58; 375 U. S. 940). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 and the Vermont Statutes Annotated and of the Constitution of the United States are set forth in the Appendix, *infra.*

QUESTION PRESENTED

Whether a tax lien of the State of Vermont, being identical to the federal tax lien, has priority over the later arising federal lien?

STATEMENT

On October 21, 1958, the defendant, Cutting & Trimming, Inc., filed a withholding tax return with the Vermont Tax Department reporting that it had withheld from the wages of its employees for the third quarter, 1958, State income taxes in the amount of $1,628.15. This sum was not paid to the Tax Department (R. 18). Thereafter, on the same date, the Commissioner of Taxes for Vermont made an assessment and demand on Cutting & Trimming, Inc. in the amount of $1,628.15. On October 30, 1958, a notice of tax lien was filed in the Burlington City Clerk's office for the unpaid taxes (R. 17). On May 21, 1959, the State of Vermont brought suit to enforce its lien against Cutting & Trimming, Inc., the Chittenden Trust Company being joined as trustee and served with a writ on May 25, 1959 (R. 10, 13, 17). The trustee filed a disclosure showing it held $1,278.82 as trustee of Cutting & Trimming, Inc., another $600 having been previously

attached by Rainbow Children's Dress Company (R. 10, 11, 13, 31). On October 23, 1959, judgment was entered by Chittenden County Court for Vermont against Cutting & Trimming for $4,049.22 and against the defendant Chittenden Trust Company in the amount of $1,278.82 (R. 11, 31). (The $4,049.22 included other tax assessments not here relevant.)

32 VSA 5765 provides that if any employer required to withhold taxes from an employee's wages "neglects or refuses to pay the same after demand, the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the State of Vermont upon all property and rights to property, whether real or personal, belonging to such employer. Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable. Such lien shall be valid as against any subsequent mortgagee, pledgee, purchaser or judgment creditor when notice of such lien and the sum due has been filed by the commissioner of taxes with the clerk of the town or city in which the property subject to the lien is situated, * * *."

On February 6, 1959, the Commissioner of Internal Revenue made assessments for outstanding 1958 federal taxes in the amount of $5,365.96 against Cutting & Trimming. The taxes arose under the Federal Unemployment Tax Act (R. 6, 31). A notice of lien was filed on or about June 2, 1959. In 1961 the United States brought the present action in the United States District Court against Cutting & Trimming, the State of Vermont and others to establish Cutting & Trimming's tax liability and to foreclose its tax lien against the property of Cutting & Trimming held by the trustee company (R. 5-8).

The defendant Chittenden Trust Company, in its answer, stated that it had $1,878.82 in its possession for distribution to the proper parties (R. 13).

The answer of the State of Vermont alleged that the October 21, 1958 assessment gave its lien priority over the federal lien (R. 8-12, 17, 18). On the United States' motion for judgment on the pleadings (R. 14-16), the District Court held that the State of Vermont's tax lien had priority over the federal lien and ordered the trust company to apply the $1,878.82 first to the payment of principal and interest on the State's tax lien and to pay the balance to the United States (R. 19-27).

The United States Court of Appeals, Second Circuit, affirmed the judgment of the District Court on May 9, 1963 (R. 44). The Court of Appeals held that under *United States* v. *City of New Britain* (1954), 347 U. S. 81, the same test of choateness which had been formulated by the courts in insolvency cases did not apply to cases where no insolvency was involved. It held that since the Vermont statute created a lien which was identical to the federal lien and which was, under the *New Britain* case, as general or specific as the federal lien, the same standards applied and that the cardinal principle of "first in time, first in right" was applicable. Thus, the Vermont tax lien had priority over the federal lien (R. 33-43).

SUMMARY OF ARGUMENT

The issue is whether a state tax lien, identical to the federal tax lien and prior in time, has priority. Although the Court has heretofore taken the position that the question of the relative priority of a federal tax lien and a competing statutory lien is governed by federal law, *United States* v. *Security Trust & Savings Bank* (1950), 340 U. S. 47, this position should be re-examined. The Court has applied state law in determining the extent of the "property and rights to property" to which a government lien attaches. *United States* v. *Durham Lumber Company, et al.* (1960), 363 U. S. 522. If the Court is willing to apply state law in order to determine whether the taxpayer has any property at all to which a government lien can attach, it should be willing to apply state law to determine whether an earlier arising lien on the taxpayer's property has given the lienor a property interest.

Even in applying the federal rules of priority, the tax lien of the State of Vermont must prevail in this case. Since no priority is conferred by statute on the federal tax lien, resort to the general lien law must be had. The cardinal rule is that the lien which is "first in time" is "first in right." The Court has also said that a lien must be choate. The lien of the State of Vermont and the lien of the United States are identical as to the time they arose, their duration, the property to which they attach and the method of enforcement. The federal tax lien has been held to be choate and so must be the State's lien, also.

The standards of choateness developed in insolvency cases are not applicable under the federal tax lien statute where no in-

solvency is involved. The differences in the historical background and statutory language of 26 U.S.C. 6321 and 31 U.S.C. 191 indicate that a different treatment is to be accorded the two types of cases. Furthermore, the Court in *United States* v. *City of New Britain* (1954), 347 U. S. 81, distinguished the treatment to be given to insolvency and non-insolvency cases.

None of the cases decided by this Court have decided the precise issue here. The insolvency cases are not applicable, as indicated heretofore. Distinguishable also are the attachment cases, the garnishment cases and the mechanics' lien cases, for contingencies can arise between the time the lien arises and the time judgment is obtained which make the fact and amount of the lien uncertain. Nor are the cases involving a circuity problem, such as *United States* v. *Buffalo Savings Bank* (1963), 371 U. S. 228, applicable. Also, the cases holding that an assignee's or mortgagee's lien to secure future indebtedness of the taxpayer is subordinate to a federal tax lien intervening prior to the incurring of the liability are not in point. *United States* v. *Ball* (1958), 355 U. S. 587; *United States* v. *Pioneer American Insurance Company* (1963), 374 U. S. 84.

The State's lien was first at every stage of the proceeding. The State assessed first, filed a lien notice first and brought suit first. The identity of the lienor and the amount of the lien were established; the property subject to the lien was as defined as that subject to the federal lien. Under these circumstances, the long established principle of "first in time, first in right" applies and Vermont's lien should be given priority. In the absence of an express declaration by Congress, neither the revenue needs of the federal government, nor the desire for uniformity, require the imposition of an unjustifiable double standard which would arbitrarily frustrate the State of Vermont in the collection of its revenues.

ARGUMENT

A STATE TAX LIEN WHICH IS IDENTICAL TO THE FEDERAL TAX LIEN AND WHICH ARISES EARLIER HAS PRIORITY WHERE THE TAXPAYER IS NOT INSOLVENT.

The Rule That It Is a Matter of Federal Law As to When a Lien Created by State Law "Has Acquired Sufficient Substance * * * As to Defeat a Later Arising Federal Tax Lien" Should no Longer be Followed.

The Court has generally taken the view that the question of the relative priority of a federal tax lien and a competing statutory lien is governed by federal law. *United States* v. *Security Trust and Savings Bank* (1950), 340 U. S. 47; *United States* v. *City of New Britain* (1954), 347 U. S. 81; *United States* v. *Pioneer American Insurance Company* (1963), 374 U. S. 84. The rule developed in the early cases and apparently went unchallenged before the Court for many years. Recently the Court has paid heed to state law under some circumstances.

> "Yet because federal liens intrude upon relationships traditionally governed by state law, it is inevitable that the court in developing the federal law defining the incidents of such liens, should often be called upon to determine whether, as a matter of federal policy, local policy should be adopted as the governing federal law, or whether a uniform nationwide rule should be formulated."
>
> *United States* v. *Brosman* (1960), 363 U. S. 237, 240.

In *Brosman* the Court adopted as federal law state law "governing the divestiture of federal tax liens." *Supra*, p. 241.

The Court has also applied state law in determining the extent of the "property and rights to property" to which a government lien attaches. *United States* v. *Bess* (1958), 357 U. S. 51, 55; *United States* v. *Durham Lumber Company, et al.* (1960), 363 U. S. 522; *Aquilino* v. *United States* (1960), 363 U. S. 509.

The federal statutes provide for a tax lien for unpaid federal withholding taxes but the statute is silent on the matter of priority. There is no requirement in the federal statutes that a state-created lien must be choate or perfected in some way to prevail over a federal tax lien. In developing such rules, the Court has apparently taken the view that there is some federal

common law governing priorities. Such a view might have been correct at the time the rule of choateness developed. See *Spokane County* v. *United States* (1929), 279 U. S. 80; *New York* v. *Maclay* (1932), 288 U. S. 290. Such a rule would seem to be no longer applicable in view of the cases which have held there is no federal common law. *Erie Railroad Company* v. *Tompkins* (1938), 304 U. S. 64; *Wheelden* v. *Wheeler* (1963), 373 U. S. 647. The Court has applied federal common law in very limited circumstances. See *Clearfield Trust Company* v. *United States* (1943), 318 U. S. 363.

The Court apparently is willing to apply state law to determine whether the taxpayer has any property at all to which a government lien can attach; *United States* v. *Bess, supra; United States* v. *Durham Lumber Company, et al., supra; Aquilino* v. *United States, supra;* but thus far has been unwilling to apply state law to determine whether the taxpayer's property interest has been diminished by the attachment of a statutory lien. When the taxpayer has some interest in the property, the Court has said the federal tax lien statute creates no property rights but merely "attaches legal consequences federally defined." *Aquilino* v. *United States, supra*, p. 513; *United States* v. *Bess, supra*, p. 55.

The United States argues that the same considerations which led the Court to look to state law in the *Brosnan* case are inapplicable here. It should be evident by now, however, that the rules applied by this Court in many cases in the interests of uniformity do displace "well established state procedures" governing the enforcement of competing property or lien interests. If the property interest of the taxpayer has been diminished by the attachment of a prior lien, it is difficult to see why the federal tax lien should attach to the property interest created by the earlier arising lien. A refusal to recognize the property interests created by the states might well infringe upon the Tenth Amendment to the Constitution of the United States. In view of this, the federal courts should look to state law to determine whether a lien has created a property interest and apply state law in determining when a state-created lien becomes effective. Beyond that the only rule of priority which should be applied is the universal rule of "first in time, first in right."

Even Under Federal Rules, a State Tax Lien Which is Identical to The Federal Tax Lien and Which Arises Earlier Has Priority Where the Taxpayer is Not Insolvent.

Even if the determination of the priority of the federal tax lien is considered a federal question, the State of Vermont must prevail in this case.

The tax lien of Vermont arose under Title 32 V.S.A. 5765, while the United States claims a tax lien pursuant to 26 U.S.C. 6321-6322. Since the statutes are silent as to the relative priority of a federal tax lien and a competing lien, *United States* v. *City of New Britain* (1954), 347 U. S. 81, we must look to the cases to find the answer.

In the *New Britain* case, *supra*, the Court held that where no insolvency is involved, the priority of statutory liens is determined by the longstanding, universal principle of "first in time, first in right."

The Court in citing Chief Justice Marshall in *Rankin & Schotzell* v. *Scott* (1827), 12 Wheat. 177, said, at page 85:

> "We believe that priority of these statutory liens is determined by another principle of law, namely, 'the first in time is the first in right.' As stated by Chief Justice Marshall in *Rankin* v. *Scott, supra:*
>
> 'The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a Court of law or equity to a subsequent claimant.' 12 Wheat., at p. 179.
>
> This principle is widely accepted and applied, in the absence of legislation to the contrary. * * * We think that Congress had this cardinal rule in mind when it enacted §3670, a schedule of priority not being set forth therein. Thus, the priority of each statutory lien contested here must depend on the time it attached to the property in question and became choate."

The declared purpose of the Vermont income tax law (which includes the withholding provisions) is "to conform as closely as may be with the internal revenue code * * *." Title 32 V.S.A. 5601.

A comparison of the two liens shows how well the declared purpose of conformity was carried out, for the liens are identical as to the property to which they attach, the time that they arise, their duration, and as to the method of enforcement.

The liens are "upon all the property and rights to property, whether real or personal" belonging to the taxpayer. Title 32 V.S.A. 5765; 26 U.S.C. 6321.

The State's lien arises "at the time assessment and demand is made by the commissioner of taxes and shall continue until the liability of such sum, with interest and costs, is satisfied, or becomes unenforceable." Section 5765, supra.

The lien of the United States arises "at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. 6322.

Court action was instituted by both the United States and Vermont to enforce their respective liens (R. 5-11, 31).

The State's lien took effect on October 21, 1958, the date the commissioner of taxes made an assessment and demand on Cutting and Trimming in the amount of $1,628.15 (R. 17). On October 30, 1958, a notice of tax lien was filed and on May 21, 1959, the State of Vermont brought suit to enforce its lien, the property in question being attached by trustee process on May 25, 1959 (R. 10, 13, 17, 31).

The lien of the United States took effect on February 6, 1959, the date an assessment for unpaid taxes was made by appellant (R. 6, 31). A notice of lien was filed on June 2, 1959, and in 1961, the United States brought suit to foreclose its tax lien (R. 5-8).

Thus, the lien of the State of Vermont was first in time not only as to the date of assessment when the respective liens took effect, but as to the time of filing notice and in bringing court action to enforce its lien.

The United States argues that the State lien fails to meet the standard of choateness which the Court has applied in determining priority.

In *New Britain*, the liens of the United States were for withholding and unemployment taxes and insurance contributions. The City of New Britain had a lien for real estate taxes. The Court found both liens to be perfected. The Court said:

"The liens may also be perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien and the amount of the lien are established. The federal tax liens are general and, in the sense above indicated, perfected."

Here the identity of the lienor and the amount of the lien were established as of the date the Vermont assessment was made. The assessment was based on the unpaid withholding tax returns filed by Cutting and Trimming for the third quarter of 1958 (R. 17, 18, 30). The property subject to the lien was "all the property and rights to property, whether real or personal." Title 32 V.S.A. 5765. This included the Cutting and Trimming bank deposit in the Chittenden Trust Co. (R. 31).

The United States protests that the Vermont lien must attach to specific property in order to prime the federal lien.

In *Illinois* v. *Campbell* (1946), 329 U. S. 362, 372, an insolvency case, the Court held that the State lien could not defeat the federal priority because this requirement was not met. Later, in *United States* v. *Gilbert Associates* (1953), 345 U. S. 361, the Court held that where the town lien and federal lien were both general and the taxpayer was insolvent, Section 3466[1] (now 31 U.S.C. 191) awarded priority to the United States. Yet, in *New Britain, supra,* the Court indicated it made no difference whether one lien was specific and one general, at least as to real estate. As was said in *United States* v. *City of Greenville* (1941), 118 F. 2d 963, 965:

"To say that the lien provided by this statute is a general lien on all the property of the taxpayer does not help in the solution of the problem presented, for a lien is not deprived of validity because it attaches to a number of pieces of property instead of to a single piece, nor is it for that reason to be subordinated to a junior lien attaching to a single piece of property."

Suffice it to say at this point that *Illinois* v. *Campbell* and *United States* v. *Gilbert Associates* were insolvency cases, a factor

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[1] "Whenever any person indebted to the United States is insolvent * * * the debts due the United States shall be first satisfied." 31 U.S.C. 191, formerly R.S. 3466.

which clearly distinguishes them from the present case, as was pointed out by the Court in *New Britain*. It is apparent that the same degree of perfection and specificity required in insolvency cases is not necessary when the taxpayer is solvent.

The property subject to the Vermont lien in this case was as much established and identified as was the property subject to the federal lien in *New Britain*. The similarity between the two liens being apparent, one can see that one lien is as specific and general as the other and as perfected. If the federal lien was perfected and choate in *New Britain*, and the Court said it was, Vermont's lien in this case is perfected and choate.

The Principles of Choateness Which the Court Has Applied in Insolvency Cases are Not Applicable Where No Insolvency Exists.

The priority of the United States is clearly set forth by statute in insolvency cases.

> "Whenever any person indebted to the United States is insolvent * * * the debts due to the United States shall be first satisfied; * * *."
>
> 31 U.S.C. 191.

Naturally, a stricter test is called for as to when a competing lienor can defeat the priority of the United States, when the statute by its terms confers such priority. There are no exceptions in the statutes and the rules about specific and perfected liens are implied exceptions to the statute.

This statute, formerly R. S. 3466, dates back to 1797, 1 Stat. 515. The question arose under Section 191 as to when property was that of the debtor from which the United States had to be first satisfied. Obviously, if title had passed from the debtor prior to insolvency, the crucial point, the priority of the United States could not reach it. Thus, the question became: To what extent must a debtor be divested of an interest in the property before the federal priority is lost?

> "Section 3466 mentions no exceptions to its requirement that 'the debts due to the United States shall be first satisfied.' It is nevertheless true that in several early decisions this Court read an exception into the section in the case of previously executed mortgages. *Thelusson* v. *Smith*,

2 Wheat. 396, 426; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386; *Brent* v. *Bank of Washington*, 10 Pet. 596, 611, 612. This doctrine seems to have been based on the theory that mortgaged property passes to the mortgagee and is no longer a part of the estate of the mortgagor. See *Conard* v. *Atlantic Insurance Co., supra*, at 441-442. The question of whether the priority of the United States under §3466 would also be defeated by a specific and perfected lien upon property, whose title remained in the debtor was reserved in those cases."

United States v. *Texas* (1941), 314 U. S. 480, 484.

More recently, the Court has indicated that on its face the statute is absolute and admits of no exceptions. *United States* v. *Waddill* (1945), 323 U. S. 353, 355.

In a number of cases, however, the Court has recognized that certain exceptions might be read into the statute, such as, a lien specific and perfected at the time of Insolvency. *New York* v. *Maclay, supra., United States* v. *Texas, supra, United States* v. *Waddill, supra, Illinois* v. *Campbell, supra, United States* v. *Gilbert Associates, supra, United States* v. *Knott* (1936), 298 U. S. 544.

To this day, however, the State of Vermont knows of no case (at least since the early 19th Century) where this Court has found that a statutory lien prevailed over the federal priority under Section 191. Nevertheless, the Court developed the test of choateness in trying to ascertain whether competing liens avoided the sweeping provisions of the statute. *Spokane Co.* v. *United States, supra, New York* v. *Maclay, supra, United States* v. *Knott, supra, United States* v. *Texas, supra, Illinois* v. *Campbell, supra, United States* v. *Gilbert Associates, supra.*

A completely different picture is painted by the federal tax lien statutes for they say nothing about the priority of the United States as against similar but earlier tax liens of states. The federal tax lien statute, 26 U.S.C. 6321, was preceded by R. S. 3670, and dates back to 1865, 13 Stat. 470. In nearly one hundred years, these statutes have remained silent about federal priority and one would think that the only question which would arise then would be as to which lien was first in time.

Certainly, Congress would have given the United States priority if it considered it desirable to do so. By the Bankruptcy Act of 1867, 14 Stat. 517, establishing a uniform system of bank-

ruptcy throughout the United States, Congress provided for priority for debts due the United States. That Act read, in part, as follows, at page 531:

> "Sec. 28. * * * In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order:
>
> First. The fees, costs, and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.
>
> Second. *All debts due to the United States, and all taxes and assessments under the laws thereof.*
>
> Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such State. * * *"
>
> (Emphasis supplied.)

As further evidence that Congress needed no help from the Courts in giving the United States priority when deemed desirable, note 26 U.S.C. 5004. That section, dating back to 1868, 15 Stat. 125, imposes a "first lien" in favor of the United States on the property to which it attaches from the time distilled spirits "are in existence as such until * * * such tax is paid."

In the light of the historical background and the difference in statutory language, it is clear that different treatment is to be accorded insolvency cases from those where no insolvency exists. Obviously, stricter rules should be applied under the insolvency statute and there is no justification for applying the choateness doctrine in a non-insolvency case in the absence of an express declaration by the Congress.

Thus, the universal principle of "first in time, first in right" is applicable.

In *United States* v. *Bradley* (1963), 321 F. 2d 224, the Court refused to apply choateness tests of insolvency cases to a distribution in bankruptcy.

The original bankruptcy statute was amended in 1898, 30 Stat. 563, so that state and local taxes were given the same status as tax claims of the United States. At the present time, 11 U.S.C. 104, providing for priority of debts in bankruptcy reads in part as follows:

"* * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: * * *"

11 U.S.C. 107(b) reads, in part, as follows:

"* * * and statutory liens for taxes and debts owing to the United States or to any State or any subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition * * *."

In the *Bradley* case, *supra,* the Court was faced with the competing claims of the federal tax lien and an earlier arising state lien. The Court said that the bankruptcy statutes do not provide an answer as to which lien is prior. The Court said that the bankruptcy statutes provide a scheme of distribution which is "exclusive of the incompatible order of priority provided for nonbankruptcy liquidations in Sec. 3466.".

Since the priority of the United States under Sec. 3466 didn't apply, and neither the bankruptcy statutes nor the statutes creating the liens provided any guidance as to priority, the Court applied the principle of "first in time, first in right." It refused to apply the strict choateness tests of Sec. 3466 and said that because the State lien attached to all of the property of the debtor, didn't render the lien inchoate. The liens were considered to be no more inchoate than the federal tax lien. To the same effect is *Adams* v. *O'Malley* (1950), 182 F. 2d 925; *United States* v. *Sampsell* (1946), 153 F. 2d 731; *In re Taylorcraft Aviation Corporation* (1948), 168 F. 2d 808.

The United States contends that the underlying reasons for granting priority in insolvency cases apply equally to tax lien cases where no insolvency is involved.

This policy, as expressed in R.S. 3466 and now 31 U.S.C. 191 is:

"to secure an adequate revenue to sustain the public burdens and discharge the public debts."

United States v. *The State Bank of North Carolina* (1828), 6 Peters 29.

Since Congress has provided a lien system to "assure the collection of federal taxes," *Glass City Bank* v. *United States* (1945),

326 U.S. 265, 267, the argument is that the same principles apply in tax lien cases as in insolvency cases. Ignored is the fact that the language of the statutes is considerably different and that if Congress had wanted to provide for federal priority in tax lien cases, it would have said so. It must be remembered that the priority of the United States is not based upon any prerogative as a sovereign but "is exclusively founded upon the actual provisions of their own statutes." *United States* v. *State Bank of North Carolina, supra.*

There is nothing unusual about treating a secured claim differently than an unsecured claim in view of the language of the insolvency statute. As stated heretofore, it is questionable whether any claimant can withstand the impact of the insolvency statute.

The United States cites *United States* v. *Security Trust & Savings Bank, supra,* as authority for application of the same principles in both types of cases. The facts of that case were considerably different than the case at hand, for that involved an attachment by a private creditor.

The basic reason for the Court's decision was that the fact and amount of the lien were unsettled there until judgment, for "numerous contingencies might arise" subsequent to the attachment which would prevent the creditor from obtaining a judgment. The language about applying a similar rule as had been applied in insolvency cases was unnecessary. Furthermore, in view of what the Court said later in *New Britain, supra,* it could not mean more than that under the facts of that case, a competing lienor would not be given priority. Finally, the numerous contingencies which could arise after attachment in a suit between private parties would not arise when a tax assessment is based on the return of the taxpayer.

The United States argues that the significant factor in the Court's giving priority to certain of the city tax liens in *New Britain* is the fact that the city liens were considered specific. However, the Court indicated it made no difference whether one set of liens was specific and the other general, *supra,* p. 84. If the federal lien is general and perfected, then the identical Vermont lien must also be so, and there is no justification for applying a double standard.

In *New Britain,* the Court was concerned with a state affecting the "standing of federal liens, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined." *Supra,* p. 86. Here there

is no such concern for the amount has been established. Certainly, it cannot be argued that the state lien arose at an arbitrary time, when the language of the statute creating it is identical to the federal statutory provision.

None of the cases of this Court preclude the Vermont lien from prevailing here.

The attachment and garnishment cases are inapplicable where "numerous contingencies might arise that would prevent the lien from ever becoming perfected by a judgment awarded and recorded." *United States* v. *Security Trust & Savings Bank, supra*, p. 50. Also see *United States* v. *Acri* (1955), 348 U.S. 211; *United States* v. *Liverpool & London Insurance Co.* (1955), 348 U.S. 215.

Distinguishable also are the mechanics' lien cases: *United States* v. *Colotta* (1955), 350 U.S. 808; *United States* v. *White Bear Brewing Co.* (1956), 350 U.S. 1010; *United States* v. *Vorreitter* (1957), 355 U.S. 15; *United States* v. *Hulley* (1958), 358 U.S. 66.

In the *Vorreitter* case, the federal tax lien arose prior to the contracts giving rise to the mechanics' lien and in the *Hulley* case it appears that the federal tax lien arose before construction began.

In all of these cases the fact and amount of the lien can be uncertain until judgment. The "numerous contingencies" referred to in *Security Trust* could arise between the time of the filing of the lien and the outcome of a suit to enforce same. In other words, the taxpayer can assert any number of defenses to the suit brought by the lienor. Apparently, this is the view taken by the Court. As indicated previously, the same reasoning does not apply where the State brings suit to enforce a lien arising out of admitted liability of a taxpayer.

In *United States* v. *Scovil* (1955), 348 U.S. 218, the landlord's distress lien was subordinate to the federal tax lien because it didn't take effect until a distress warrant was issued—long after the federal lien took effect.

United States v. *Ball* (1958), 355 U.S. 587, is not in point. In that case the question was whether an assignment made by a subcontractor to a surety was a mortgage under 26 U.S.C. 3672. The Court said it was not.

Neither *United States* v. *Buffalo Savings Bank* (1963), 371 U.S. 228, nor *United States* v. *Pioneer American Insurance Co.* (1963), 374 U.S. 84, strengthen the position of the United States. *Buffalo Savings* involved a circuity problem and the local tax liens attached subsequent to the federal tax lien.

Pioneer American holds that a mortagee's lien for an attorney's fee is subordinate to a federal tax lien when, at the time the latter is filed, the fee is uncertain in amount and yet to be incurred. The Court also cited *United States* v. *Ball* as holding that an assignee's or mortgagee's lien to secure future indebtedness of the taxpayer is subordinate to a federal tax lien intervening prior to the incurring of the liability. It is true that the Court referred to the choateness doctrine in determining what amounts under the mortgage would take priority over the federal lien. Again the Court showed concern that a state might be able to cause "an inchoate lien to attach at some arbitrary time, even before the amount of the tax, assessment, etc., is determined." P. 774-775. Again, we emphasize that there is no such danger where, as here, the lien arises pursuant to statutory language identical to that set forth in the federal statutes and where the amount of the lien is established. The situation is far different from that in *Pioneer American* where the issue was whether a mortgagee can claim a lien for possible future indebtedness—for amounts which were not yet incurred and which were uncertain at the time the federal tax lien was filed. Nor does this in any way indicate that the Court will apply the rules of choateness as strictly in non-insolvency cases as in insolvency cases.

Since we have two competing tax liens which are identical in every respect with the State's lien first at every stage of the proceedings, the State's lien should prevail. To hold otherwise would be contrary to the long-established principle of lien priority, "first in time, first in right," a principle which was universal even in the days of Chief Justice Marshall. To say that the federal lien is choate and perfected at the time of assessment, even though steps must be taken to enforce it, and then to say that an identical state lien is inchoate because steps must be taken for its enforcement is to impose an unjustifiable double standard. The revenue needs of the federal government do not justify such a double standard and there is no evidence Congress ever intended same. Certainly, there is nothing in the language or history of the tax lien statutes to indicate this. In fact, the evidence is that Congress does not consider the revenue needs of the federal government so paramount as to cause the needs of the states and municipalities to be ignored. Although priority has been conferred upon the United States by statute in insolvency cases, in bankruptcy cases the tax claims of the federal government and the states have equal status. Again, if Congress had considered uniformity necessary, it would have

said so.. As long as the state tax lien arises in the same manner as the federal lien, and therefore is not arbitrarily created, the United States cannot be hampered by lack of uniformity. Under circumstances such as these, the federal tax lien should be treated no better and no worse than the state tax lien.

In this day and age, the tax collections of the states are in far greater need of protection than are those of the federal government with its broad sources of revenue and the states should not be arbitrarily frustrated in their efforts by departures from the longstanding rule of priority.

If Vermont cannot prevail in this case, it is to say that even where no insolvency is involved and where no federal priority is established by statute, no lienor can prevail over the federal tax lien.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

26 USCA section 6321.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 USCA section 6322.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

26 USCA section 6323.

(a) Invalidity of Lien Without Notice.—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate * * *.

Title 32 VSA section 5601.

It is hereby declared that the purpose of this chapter, in addition to the essential purpose of raising revenue, is to conform as closely as may be with the internal revenue code in order that the filing of returns may be simplified and the taxpayers' accounting burdens may be reduced.

Title 32 VSA section 5765.

If any employer required to deduct and withhold a tax under section 5761 of this title neglects or refuses to pay the same after demand, the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the State of Vermont upon all property and rights to property, whether real or personal, belonging to such employer. Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable. Such lien shall be valid as against any

subsequent mortgagee, pledgee, purchaser or judgment creditor when notice of such lien and the sum due has been filed by the commissioner of taxes with the clerk of the town or city in which the property subject to the lien is situated, or, in the case of an unorganized town, gore or grant, in the office of the clerk of the county wherein such property is situated. * * *

United States Constitution.

Amendment X. [Powers reserved to the states.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 509

UNITED STATES OF AMERICA, PETITIONER

v.

VERMONT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The State of Vermont contends that it is unfair to give the federal government the priority which results from treating the federal tax lien upon all of a taxpayer's property as perfected, but treats a similar earlier-arising State tax lien as unperfected because, when the federal lien arose, the State lien had not yet attached to specific property. But when the State's contention is evaluated in the context of the statutory provisions involved in this case, we submit that there would be no unfairness to the State in holding that because its lien does not meet the federal standard of choateness or perfection, the lien is subordinate to the federal lien.

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The effectiveness of any tax lien as an aid to collection of the revenue is inextricably intertwined with the underlying tax statute itself. Although the State and federal liens in the present case are identical in the sense that each attaches to all the taxpayer's property and property rights, and each arises when the tax is assessed, the difference in the assessment and collection of the respective underlying taxes makes the effect of the two liens on the abilities of the respective sovereigns to collect their taxes far from identical. The State lien is for State income taxes which the employer had withheld from wages paid to its employees but had failed to remit to the State. This tax is payable quarterly by the employer and the payment for the third quarter of 1958, which is involved in this case, was due before the end of October of that year (32 V.S.A. Section 5762). The federal tax is the federal unemployment tax for 1958. Unlike the State tax, however, that tax is not due quarterly, but on January 31 for the entire preceding year. Internal Revenue Code of 1954, Section 3301; Treasury Regulations on Employment Tax (1954) Code, Section 31.6071(a)–1(c). Thus, when the State's lien arose on October 21, 1958, by virtue of the State's assessment and demand upon Cutting and Trimming for the quarterly portion of the State income tax which it had not yet paid, the federal tax claim for the same portion of that year had not yet arisen. Hence, even though the federal government moved promptly as soon as Cutting and Trimming's 1958 federal payroll tax had accrued—it made its

assessment on February 6, 1959, only six days after the tax was due—there was no way in which the federal government possibly could have collected its claim if the State's earlier general lien was sufficiently perfected to defeat the federal lien which arose on February 6.

On the other hand, the State had more than three months from the time it assessed its tax on October 21, 1958, to the first date on which the federal tax lien could possibly have arisen (February 1, 1959) within which it could have taken steps to perfect its lien by attaching specific property. If within this period the State had instituted its suit and attached the taxpayer's funds on deposit in the Chittenden Trust Company, it would have had a fully perfected lien which would have defeated the later arising federal lien. The State, however, waited seven months after assessing its tax before taking any steps to perfect its lien.

In these circumstances, there is no unfairness to the State in requiring that, before its general lien can prevail over the federal lien, it must take the necessary steps to perfect it—here by attaching it to specific property. The critical consideration is that to permit a State tax lien which does not meet the federal standard of choateness to defeat the federal priority would thwart "the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents" (*United States* v. *Security Trust & Savings Bank*, 340 U.S. 47, 51). For otherwise, as this Court pointed

out in *United States* v. *New Britain*, 347 U.S. 81, 86, a State always could "affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined." [1] *New Britain* held (*ibid.*) that

[1] Similar threats to the collection of federal revenues, due to differences between State and federal assessment and collection procedures, are reflected in the taxes involved in several of the cases arising under Section 3466 of the Revised Statute, in which this Court developed the doctrine of the choate lien (see the discussion of those cases in our main brief, pp. 13-14). A dramatic example is *United States* v. *Texas*, 314 U.S. 480, which involved State and federal taxes upon wholesale gasoline sales. Both taxes were collected monthly, but the State tax was due on the 20th of the following month and the State lien upon all of the taxpayer's business property arose automatically on the due date; the federal tax, however, was not due until the end of the succeeding month and the federal lien did not arise until there had been an assessment. In such a situation, if the State general lien were deemed perfected when it arose on the 20th of the month, the federal lien could never be effective to aid the United States in collecting its similar taxes for the same month.

A related problem may grow out of the fact that frequently the federal tax is not assessed until a substantial time after the tax is due, and the federal lien in turn does not arise until assessment. (Under the Code, when a taxpayer institutes a proceeding in the Tax Court to review an asserted deficiency, the tax cannot be finally assessed until such proceeding is completed. Internal Revenue Code of 1954, Sections 6215(a), 7481, 7485.) Thus, in *New York* v. *Maclay*, 288 U.S. 290, the United States was claiming priority for corporate income taxes for 1917 and 1918; the deficiency assessments for those taxes, however, had not been made until 1923 and 1925. The State was asserting its general liens for annual corporate franchise and gross income taxes for the years 1921 to 1925; these liens, like the State gasoline tax liens in the *Texas* case, *supra*, arose automatically when the respective taxes became due on March 15 and August 15. In that situation, as in the *Texas* case, the

for this reason a State lien which had not "become certain as to amount, identity of the lienor, or the property subject thereto" when the federal lien attached could not "displace such federal liens." Since, when the federal lien in this case arose on February 6, 1959, the tax lien of the State of Vermont did not meet the requirement that "the lien must attach to specific property of the debtor" (*Illinois* v. *Campbell*, 329 U.S. 362, 373), the federal lien has priority.

Respectfully submitted.

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federal liens would have been ineffective to protect the federal revenue based on taxes for earlier years if the general State tax liens for subsequent years were deemed perfected when they arose.

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